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In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an Indian tribe have inherent regulatory authority over a State and its local governments with respect to discharges into streams and other bodies of water from fee-owned land within the exterior boundaries of the tribe's reservation?

PARTIES

In addition to the parties listed in the caption, several irrigation districts organized under Montana law, along with several individual farmers and ranchers,[1] had sought to intervene at the district court level under Fed. R. Civ. P. 24(a) and (b). The district court denied their motion to intervene (Pet. at 41a), and the Court of Appeals affirmed. Pet. at 15a.

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[1] The irrigation districts are the Flathead Joint Board of Control, the Mission Irrigation District, the Jocko Valley Irrigation District, and the Flathead Irrigation District; and the individual farmers and ranchers are Ross Middlemist, Wayne Maughn, William Slack, and Glenn Murphy.

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PETITION FOR WRIT OF CERTIORARI

Petitioners State of Montana; Lake County, Montana; City of Ronan, Montana; and Town of Hot Springs, Montana, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 137 F.3d 1135 (9th Cir. 1998) and is reproduced in the Appendix commencing at Pet. 1a. The opinion of the District Court is reported at 941 F. Supp. 945 (D. Mont. 1996) and is reproduced commencing at Pet. 16a. The decision of respondent United States Environmental Protection Agency at issue herein is not reported and is reproduced commencing at Pet. 50a.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The petition presents a question of federal common law which arises in the context of the following statutory and regulatory provisions:

1. Clean Water Act of 1972, as amended, 33 U.S.C. §§ 1251-1387 (1997); 33 U.S.C. §§ 1313, 1370, and 1377 are reproduced at Pet. 118a, 129a, and 130a.

2. Water Quality Standards: Requirements for Indian Tribes to Administer a Water Quality Standards Program, 40 C.F.R. § 131.8 (1997), reproduced at Pet. 113a.

STATEMENT

While this case arises on the Flathead Indian Reservation ("Reservation") in Montana, it more generally calls upon this Court to again address the consequences of the legal and historical events which have shaped modern Indian country. Congress created the Reservation when it ratified the 1855 Treaty of Hellgate. Act of Mar. 13, 1859, 12 Stat. 975. As it had with many other Indian reservations, Congress later "authorized allotments in severalty of Flathead Reservation land to members of the Tribes." Act of Apr. 23, 1904, 33 Stat. 302; *see generally Confederated Salish and Kootenai Tribes v. United States*, 437 F.2d 458, 460-62 (Ct. Cl. 1971). After reservation lands had been allotted to tribal members, Congress authorized nonmembers to enter the Reservation and acquire fee title to land under the "general provisions of the homestead, mineral, and town-site laws of the United States." 33 Stat. 303.

As a result of these policies and other historical trends, non-Indians now comprise over three-fourths of the Reservation's population. A.R., Vol. I, tab. 4 at 13-14; *see also* 1990 Census of Population; General Population Characteristics; Montana (Table 13). Similarly, of the 1.2

million acres of land within the original Reservation, slightly more than 530,000 acres are now held in fee by persons who are not tribal members or by state and state governmental entities, including Petitioners. A.R., Vol. I, tab. 4 at 2; *see also Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 466 (1976).

Petitioners conduct governmental activities within the Flathead Indian Reservation that are subject to regulation under the Clean Water Act of 1972, 33 U.S.C. §§ 1251-1387 (1997), and its state law counterpart, the Montana Water Quality Act. Mont. Code Ann. §§ 75-5-101 to -1122 (1997). The State of Montana operates a research facility that discharges treated effluent into Flathead Lake, while Lake County, Polson, and Ronan operate municipal wastewater treatment plants that discharge treated effluent into several other streams or bodies of water within the Reservation. Pet. 19a-20a. Lawful operation of each facility requires issuance of a National Pollution Discharge Elimination System ("NPDES") permit under 33 U.S.C. § 1342, along with a similar permit under Montana law. Mont. Code Ann. § 75-5-605(2). Prior to this controversy respondent United States Environmental Protection Agency ("EPA") did not require Petitioners to secure an NPDES permit but instead deemed state-issued permits as constituting compliance with the Act.

A condition precedent to issuance of a NPDES permit is certification from the involved State that the proposed discharge complies with the requirements of the Clean Water Act and, if more stringent than federal standards, the requirements of state law. 33 U.S.C. § 1341(a)(1). The issue here is whether EPA properly determined that respondent Confederated Salish and Kootenai Tribes have

inherent regulatory authority over Petitioners' activities related to the discharges and thus may be deemed a "State," thereby requiring certification by the Tribes.

I. STATUTORY AND REGULATORY BACKGROUND

In 1987 Congress amended the Clean Water Act to allow Indian tribes to be "treated as a State" ("TAS")[2] for various purposes. Pub. L. No. 100-4, tit. V, § 506, 101 Stat. 76, *amended* Pub. L. No. 100-581, tit. II, § 207, 102 Stat. 2940, *codified at* 33 U.S.C. § 1377. That amendment, § 518 of the Act (33 U.S.C. § 1377) (Pet. 132a), provides in relevant part:

> The Administrator is authorized to treat an Indian tribe as a State . . . to the degree necessary to carry out the objectives of this section, but only if –
>
> . . . .
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust

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[2] EPA has discontinued the use of the terms "treated as a State" or "treatment as a State" (Final Rule, *Indian Tribes; Eligibility for Program Authorization*, 59 Fed. Reg. 64,339 (Dec. 14, 1994)), opting instead to use the term "treatment in the same manner as a State." *Id.* at 64,343 (amending 40 C.F.R. § 124.2). The abbreviation "TAS" used in the text is inclusive of all of the various labels used to describe instances in which tribes are **authorized** under the Act to be deemed a State.

> restriction on alienation, or otherwise within the borders of an Indian reservation.

33 U.S.C. § 1377(e)(2). In December 1991, EPA issued final regulations concerning the standards for determining tribal requests for authority to promulgate water quality standards pursuant to § 303 of the Act, 33 U.S.C. § 1313. Final Rule, *Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations*, 56 Fed. Reg. 64,876, 64,877-880 (1991), *codified at* 40 C.F.R. § 131.8 (1997) ("Final Rule") (Pet. 92a, 113a). The Final Rule contained a preamble addressing several of the issues that had been raised with respect to the proposed water quality standards rule (Proposed Rule, *Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations*, 54 Fed. Reg. 39,098 (Sept. 22, 1989)) including the question of how § 518 was to be interpreted and applied consistent with federal common law defining the inherent regulatory authority of Indian tribes. Pet. 96a-106a.

EPA first rejected the argument that § 518 constituted an express delegation of federal power to Indian tribes, concluding that "Congress only manifested an intent to authorize EPA to treat Indians as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law." Pet. 111a. This approach, EPA explained, "will best effectuate the overall purposes of the [Act]". *Id.* According to EPA the scope of tribal authority for purposes of § 518 was to be determined by reference to federal common law principles, most specifically those articulated in *Montana v. United States*, 450 U.S. 544 (1981), and later decisions of this Court addressing the same. Pet. 111a.

EPA then went on to formulate an "interim operating rule" that recognizes inherent tribal authority over nonmembers on fee lands in virtually all instances. Pet. 101. The operating rule is based wholly on the EPA's interpretation of the second exception to *Montana's* bedrock "general rule that, absent a different Congressional direction, Indian tribes *lack* civil authority over the conduct of nonmembers on non-Indian land within a reservation." *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1409 (1997) (emphasis supplied). In articulating the second exception, the *Montana* Court explained that

> [a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566. In explaining how it interpreted that exception, EPA first noted that in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), "several justices argued that for a tribe to have a 'protectible interest' in an activity [for purposes of the second *Montana* exception], the activity's effect should be 'demonstrably serious.' " Pet. 100a. Accordingly, EPA concluded that the "prudent" approach would be to "require a showing that the potential impacts of regulated activities on the tribe are serious and substantial." *Id.*

EPA's ensuing application of its "serious and substantial" standard was premised on its conclusion that "there are substantial factual and legal reasons to assume that Tribes *ordinarily* have the legal authority to regulate

water quality within a reservation." Pet. 99a-100a (emphasis supplied). As EPA then explained, there were two such "reasons." The first is that impacts to water quality cannot be regulated efficiently along political boundaries. Pet. 102a-103a. The second is that the Clean Water Act itself constitutes a "legislative determination that activities which affect surface water and critical water quality habitat may have serious and substantial impacts." Pet. 102a.

In light of these "generalized findings," EPA formulated an operating rule which required applicant tribes to make

> a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe.

Pet. 105a. In remarkable understatement, EPA explained that "tribes will usually be able to meet the . . . operating rule." Pet. 101a. Once an applicant tribe has met this minimal pleading requirement

> EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality . . . *presume* that there has been an adequate showing of tribal jurisdiction

> of fee lands, unless an appropriate governmental entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.

Pet. 106a (emphasis supplied). EPA did not explain what showing is required to demonstrate a lack of tribal jurisdiction. The practical effect, however, of EPA's operating rule is to establish a presumption of inherent tribal regulatory authority over nonmember activity on non-Indian lands. *See* Pet. at 8a.

II. PROCEEDINGS BELOW

A. Administrative Proceedings

In April 1992 the Tribes applied for TAS status under § 303 of the Act (33 U.S.C. § 1313) with respect to all surface waters within the Flathead Reservation. A.R., Vol. I, tab 3. Petitioners filed comments in accordance with 40 C.F.R. § 131.8(c)(3). A.R., Vol. II, tab 21. In those comments Petitioners opposed TAS status to the extent it would recognize the existence of the Tribes' inherent authority over their activities on fee lands. *Id.*[3]

In February 1995 EPA approved the Tribes' application to administer a water quality standards program applicable to all lands and surface waters within the Reservation. Pet. 50a, 62a-68a. As a consequence of EPA's decision, the Tribes were entitled to submit, and thereafter did submit successfully, their water quality standards

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[3] Petitioners have not contested the EPA decision insofar as it accords the Tribes TAS status with respect to tribal, trust, and member-owned lands within the Reservation.

to EPA for approval under § 303 of the Act, and are entitled to exercise the certification authority granted under § 401 of the Act, 33 U.S.C. § 1341. Pet. 50a; *see generally PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700, 704-08 (1994).

Applying its Final Rule's analysis, EPA concluded that the Tribes possess inherent authority over nonmembers on fee lands throughout the Reservation for the purposes of setting water quality standards. Pet. 68a. In so holding, EPA declined to hold an evidentiary hearing relative to the Tribes' factual submissions. Pet. 63a-64a. In support of its "generalized finding" that nonmember activity can affect the Tribes' interests, EPA also cited a list of specific instances of alleged nonmember pollution of reservation waters (Pet. 70a-91a) which had been assembled after Petitioners had submitted their response. A.R., Vol. II at tabs 25, 30, 31.

B. Judicial Review of EPA's Decision

In May 1995, Petitioners sought judicial review of EPA's decision. Pet. 19a. The District Court issued its opinion and judgment in March 1996 upholding EPA's determination that the Tribes possessed inherent authority over nonconsenting nonmembers on fee lands. Pet. 16a. The District Court largely adopted EPA's Final Rule analysis. On appeal, the Ninth Circuit affirmed. Pet. 1a. In so doing it first rejected EPA's suggestion that its interpretation of federal Indian law was entitled to deference. Pet. at 11a. Explaining that this Court's decisions had left "some confusion as to what the correct standard should be" (Pet. at 10a), the Court of Appeals concluded

that "EPA has [not] committed any material mistakes of law in its delineation of the scope of inherent tribal authority" (Pet. 11a) and that its analysis "appear[ed] to adumbrate the Supreme Court's holding in *Strate* . . . [which] reaffirms the validity of *Montana*" (Pet. 12a).

Turning to EPA's application of the second *Montana* exception, the Court of Appeals cited *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981), for two general propositions: (1) that "threats to water rights may invoke inherent tribal authority over non-Indians"; and (2) that water is a "unitary resource" which cannot be regulated along political boundaries. Pet. 12a. The court below distinguished *Strate* on the ground that "the conduct of a user of a small stretch of highway has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the principal water source." Pet. 12a-13a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' APPLICATION OF THE SECOND *MONTANA* EXCEPTION CANNOT BE RECONCILED WITH *STRATE* AND PRESENTS AN IMPORTANT FEDERAL QUESTION CONCERNING THE SCOPE OF THAT EXCEPTION.

A.

In *Strate* this Court observed that, "[r]ead in isolation, the *Montana* rule's second exception can be misperceived." 117 U.S. at 1416. The Court of Appeals' decision, like EPA's decision that it affirms, exemplifies just such a

misperception by transforming the second exception into a virtually irrebuttable presumption in favor of tribal authority where water quality regulation is involved. This case thus presents the Court with an opportunity to further clarify in an exceedingly important context the proper application of the *Montana* rule and its second exception.

The Court of Appeals' errors are twofold. The first is its view that, by reaffirming *Montana*'s approach to determining the reach of inherent tribal authority over nonmembers with respect to conduct on nontribal land, *Strate* also sanctioned the proposition that the second exception requires little more than a generalized, and plainly quite subjective, "tribal interest" inquiry to rebut the presumption against the existence of such authority. The second lies in conducting that inquiry without reference to how the involved tribal interests can otherwise be protected from nonmember activities under extant state and federal law. Central to this conclusion is a proper understanding of this Court's reasoning both in *Strate* and in *Brendale*.

Brendale presented the question whether the Confederated Tribes and Bands of the Yakima Nation had the authority to impose their zoning ordinance as to activities on fee land owned by tribal nonmembers. One of the involved parcels was in an area of the reservation (the "closed area") that was almost wholly tribally-owned and that traditionally had been closed to non-Indian entry. 492 U.S. at 415. The other parcel was in an area of the reservation (the "open area") where, by virtue of allotment-era policies, access was not restricted and over half of the land was owned by tribal nonmembers. *Id.* at 415-16. A splintered Court upheld the Tribes' power to

enforce their zoning ordinance with respect to the closed area (*id.* at 444) but denied the Tribes' power to do so with respect to the open area. *Id.* at 432.

Justice White, writing for himself and three members of the Court, flatly rejected the notion that every "direct effect" on a protected tribal interest may form a basis for the exercise of inherent tribal authority over nonmembers under the second *Montana* exception. He explained that the court of appeals had incorrectly "transformed this indication that there may be other cases in which a tribe has an interest in activities of nonmembers on fee land into a rule describing every case in which a tribe has such an interest" (*id.* at 429), and had otherwise improperly "equated an Indian tribe's retained sovereignty with a local government's police power, which is contrary to *Montana* itself." *Id.*; *see also id.* at n.11 (same).

Instead, "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land" (*id.* at 430), and that

> *Montana* suggests that in the special circumstance of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses on the political integrity, economic security, or the health or welfare of the tribe. But . . . that interest does not entitle the tribe to complain or obtain relief against every use of fee land that has some adverse effect on the tribe. The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe.

Id. at 430-31. Justice White's understanding of how the second exception was to be applied was taken directly from *Montana* itself. There, in holding that the tribe lacked inherent authority to regulate nonmember hunting and fishing on fee lands, the Court explained that

> the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, has established its season, bag or creel limits in such a way as to impair the [tribe's] treaty rights to fish or hunt, or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State.

Montana, 450 U.S. at 566 n.16. Justice White's *Brendale* opinion thus clarified what was already established in *Montana*: that the second exception may serve as a basis for direct tribal authority over nonconsenting nonmembers in few situations; and that a tribe's recourse normally lies in pursuing available state and federal remedies to mitigate the alleged infringement on tribal interests. Accordingly, the Tribe in *Brendale* should have first presented its claim in proceedings before the local government zoning board and, if adequate relief was not forthcoming, then in a federal cause of action designed to protect the interests *defined by* the exception. 492 U.S. at 430; *see also id.* at 460 (Blackmun, J., concurring in part & dissenting in part) (criticizing Justice White's "new-fangled federal nuisance-type cause of action").

Justice Stevens, joined by Justice O'Connor, focused on the tribes' original power to exclude nonmembers from tribal territory – "a power unknown to any other sovereignty in this Nation" (492 U.S. at 433) – and drew a

distinction between the closed and open areas of the reservation. With respect to the closed area, he reasoned that

> just as Congress could not possibly have intended in enacting the Dawes Act that tribes would maintain the power to exclude bona fide purchasers of reservation land from that property, it could not have intended that tribes would lose control over the character of their reservations upon the sale of a few, relatively small, parcels of land.

Id. at 441. With respect to the open area, Justice Stevens concurred with Justice White that "the tribe lacks authority to regulate the use of [the] property," explaining that "so long as [it] is not used in a manner that is preempted by federal law, the Tribe has no special claim for relief." *Id.* at 445.

Most critical here is the fact that in *Brendale* six members of this Court agreed that state and federal remedies, not direct tribal regulation predicated on inherent authority, were to be utilized to protect tribal interests in reservation areas where allotment-era or other acts operated to eliminate the territorial exclusivity that is a necessary condition to the effective exercise of territorial sovereign power. *Accord South Dakota v. Bourland*, 508 U.S. 679 (1993); *see generally* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809, 894-902 (1996).

The principles embodied in *Strate* flow directly from the Court's earlier dialogue in *Brendale*. *Strate*'s primary significance here lies in the Court's unanimous reaffirmation of *Montana*'s presumption against tribal authority

over nonmembers (117 S. Ct. at 1409-10) and in its further explication of the purpose and scope of the second exception. In discussing the second *Montana* exception, the Court initially observed: "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members[,] [b]ut if *Montana*'s second exception requires no more, the exception would severely shrink the rule." *Id.* at 1415.

The Court then explained that the four cases[4] cited in *Montana* in support of the second exception "indicate[d] the character of the tribal interest the Court envisioned." 117 S. Ct. at 1415. Each of those cases focused on "the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government." *Id.* The second exception thus was intended as a shield to be used where "needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them' " (*id.* at 1416 (quoting *Williams*, 358 U.S. at 220)); and not as a sword to project tribal coercive powers over nonmembers whenever some "tribal interest" can be identified.

Strate clarifies that the presumptive absence of inherent tribal authority as to nonmember activity on nontribal lands within a reservation is not rebutted under the second *Montana* exception except when such authority is essential to tribal *self*-governance; i.e., when application

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[4] *Fisher v. District Court*, 424 U.S. 382 (1976) (per curiam); *Williams v. Lee*, 358 U.S. 217 (1959); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); *Thomas v. Gay*, 169 U.S. 264 (1898).

of tribal law is essential to preserve a tribe's inherent power "[to punish tribal offenders], to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Id.* at 1416 (quoting *Montana*, 450 U.S. at 564). The Court's citation to infringement test in *Williams v. Lee* is accordingly critical, because it stands for the principle that the exercise of inherent tribal authority over nonmember fee land activity is limited to situations where state law has been preempted by virtue of interference with tribal self-government. Absent preemption, the "optional use" of tribal law is not essential to protecting the tribe's ability to govern itself or to order its internal affairs. 117 S. Ct. at 1416.

The Court of Appeals' interpretation of *Montana*'s second exception "would severely shrink the [general] rule" by inserting in its stead a standardless approach for determining inherent tribal authority. Boiled down to its essentials, the court's conclusion that tribal authority exists here is grounded in a determination that the protection of water quality is qualitatively different from and more important to Indian tribes than highway safety (*Strate*), land use (*Brendale*), or fish and wildlife regulation (*Montana*). Clearly, the notion that "water is more important than land" cannot serve as a meaningful normative standard. As this case reveals, such an approach is constrained by little more than the decision-maker's policy preferences. More important, however, is that the failure of the Court of Appeals to consider extant state and federal remedies cannot be reconciled with *Strate*.

B.

There has been no reasoned claim in this case – and certainly no finding by EPA or any court – that Montana's water quality laws have been preempted with respect to nonmember activities on fee lands on the Reservation. Nor could there be one. Just as Congress did not delegate federal authority to tribes in adopting § 518, so too it did not preempt state law in the 1987 amendments to the Act. A different conclusion would be incompatible with 33 U.S.C. § 1370 (Pet. 130a), which specifically disclaims any intent "[e]xcept as expressly provided" to "impair[] or in any manner affect[] any right or jurisdiction of the States with respect to the water . . . of such States." *See* Pet. at 65a ("EPA['s] regulations . . . do not construe the CWA . . . as preempting State regulation"); *cf. Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 922 (1st Cir. 1996) (disapproving district court's conclusion that grant of TAS status to tribe evidenced Federal Government's intent to establish "Indian country" or otherwise preempt state law).

Questions of preemption aside, there is also no support in the record for an argument that Montana's laws are inadequate to protect the Tribes' treaty rights or more general interest in clean water. To the extent those interests may be affected, the State has the authority to protect them by requiring Petitioners to comply with state-established water quality standards (Mont. Code Ann. § 75-5-103(23) (defining "person" to include State or political subdivision); *id.* §§ 75-5-301 to -317 (classification of and standards for surface waters) and to secure and comply with state-issued discharge permits (*id.* §§ 75-5-401 to -405 (discharge permits). *See also id.*

§§ 75-5-601 to -641 (enforcement, appeals and penalties). Finally, even assuming arguendo state law is preempted or in some way inadequate, the Court of Appeals' decision additionally fails to explain why direct federal promulgation of water quality standards (33 U.S.C. § 1313(c)(4) (Pet. 122a)), coupled with federal issuance of discharge permits (33 U.S.C. § 1342(a); *see generally Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1991)) and, if necessary, federal enforcement against Petitioners for any standard or permit violation (33 U.S.C. § 1319(b), (e) and (g)), would be inadequate to protect the Tribes' interests.

C.

This case involves the first instance of a federal appeals court's recognizing the existence of inherent tribal authority over the governmental activities of a State or its political subdivisions. This absence of historical precedent for the Ninth Circuit's ruling is of obvious significance in determining its correctness (*see, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197-206 (1978); *Duro v. Reina*, 495 U.S. 676, 690-93 (1990)), but it additionally raises the question whether application of tribal jurisdiction over the States through the second *Montana* exception is permissible in any instance.

It is, as a threshold matter, extraordinary to conclude that a sovereign State and its counties or towns are subject to the coercive powers of a tribe whose inherent authority is unconstrained by the careful delineation of federal and state powers in the Constitution. Indeed, to so conclude would be to accept that tribes, as "domestic *dependent* nations" (*Cherokee Nation v. Georgia*, 30 U.S. (5

Pet.) 1, 16 (1831)) (emphasis supplied) possess comparable – indeed perhaps greater – powers with respect to the States than their guardian the Federal Government itself. *Cf. Kiowa Tribe of Okla. v. Manufacturing Tech., Inc.*, No. 96-1037, 1998 WL 260001, at *6 (U.S. May 26, 1998) (Stevens, J., dissenting) ("Why should an Indian tribe enjoy broader immunity than the States, the Federal Government, and foreign nations?") This proposition cannot be squared with a constitutional plan under which the Federal Government's *own* powers derive from the States' agreement to divest themselves of authority for purposes of forming a national government. *See, e.g., New York v. United States*, 505 U.S. 144, 155-66 (1992) ("[t]he Constitution has never been understood to confer upon Congress the ability to require States to govern according to Congress' instruction"); *cf. Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991) (rejecting notion that "the States had waived their [Eleventh Amendment] immunity against Indian tribes when they adopted the Constitution"); *Kiowa Tribe*, 1998 WL 260001, at *3 (same).

These federalism concerns counsel that the exercise of inherent tribal authority over the governmental activities of state and local governments can be justified, if at all, only in quite exceptional circumstances. *Cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983) ("in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members"). Such circumstances are plainly absent here since the Tribes' interest with respect to water quality is protected under state and federal law.

II. THE COURT OF APPEALS' DECISION HAS BROAD SIGNIFICANCE NOT ONLY WITH RESPECT TO FUTURE APPLICATION OF THE ACT'S TAS PROVISION BUT ALSO IN OTHER SITUATIONS WHERE THE SECOND *MONTANA* EXCEPTION IS RELIED UPON AS A BASIS FOR THE EXERCISE OF INHERENT TRIBAL AUTHORITY OVER NONMEMBERS.

The numerical and geographic magnitude of the TAS issue is illustrated by the fact that as of March 1998, over 210 tribes nationwide have received or are in the process of seeking TAS status under the Act or the counterpart TAS provision of the Safe Drinking Water Act, 42 U.S.C. § 300j-11. *EPA Treatment of Tribes in The Same Manner as States/Program Approval Matrix* (March 1998) (Pet. 135a).[5] Although the majority of the tribal submissions involve grant requests under § 106 of the Act, 33 U.S.C. § 1256, to assist in developing pollution control programs, the sheer number of tribes currently in the planning stages reflect the need to determine whether EPA's application of the second *Montana* exception is correct.

With respect to the specific parties to this proceeding, moreover, it is clear that this decision will be viewed by EPA as preclusive in all subsequent TAS applications by the Tribes under other environmental programs involving water. This point is demonstrated by the fact that, while

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[5] Petitioners' counsel received a copy of this document from the American Indian Environmental Office, U.S. Environmental Protection Agency, 401 M Street SW, Washington D.C., 20460. It is submitted for the Court's consideration pursuant to Sup. Ct. Rule 14.1.(i)(vi).

EPA attempted to limit its decision to this specific situation (Pet. 50a, 60a), it had explained several months earlier that

> once [EPA] makes a jurisdictional determination in response to a tribal application regarding any EPA program, it will ordinarily make the same determination for other programs unless the subsequent application raises different legal issues.

Final Rule, 59 Fed. Reg. at 64,340. In a similar manner, the Ninth Circuit's decision may also be viewed as the predicate for independent tribal enforcement of their water quality standards against Petitioners and others similarly situated. *See* Pet. at 60a (noting that "the Tribes may, in an independent action, enforce tribal water quality standards"). Affirmance of EPA's TAS determination thus may have far-reaching effects for both Petitioners and other nonmembers on the Reservation.

It must be emphasized finally that the Court of Appeals applied *general* principles of federal Indian law to reach the holding below. Consequently, while this dispute was precipitated by a TAS application under the Clean Water Act, the analysis employed by the court is not limited to that context. At a very minimum the standardless "tribal interest" approach sanctioned by the Ninth Circuit will allow EPA easily to extend "generalized findings" beyond the water context into any other subject matter encompassed by a federal environmental program. A more likely result, however, is that the court's standardless approach will be employed more broadly in the Ninth Circuit and perhaps other circuits to expand the reach of inherent tribal authority far outside the

highly limited purpose assigned the second *Montana* exception in *Strate*.

Timely guidance from this Court on an issue of critical importance to the formulation of tribal regulatory programs is therefore warranted. It makes little sense to await further case law development when the Court of Appeals' decision is so obviously suspect. No less important, delaying resolution of the issue here does little justice to EPA, to those Indian tribes that desire to establish regulatory programs, or to the public and private parties who will be obligated to comply with the tribal programs, if the jurisdictional basis of those programs is removed a number of years later. Early and clear guidance from this Court on this important question will assist in preserving public and private resources.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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May 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF MONTANA; LAKE COUNTY, MONTANA, a political subdivision of the State of Montana; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation, *Plaintiffs,* and FLATHEAD JOINT BOARD OF CONTROL, MISSION IRRIGATION DISTRICT, JOCKO VALLEY IRRIGATION DISTRICT, FLATHEAD IRRIGATION DISTRICT, local governments; ROSS MIDDLEMIST, WAYNE MAUGHAN, WILLIAM SLACK and GLENN MURPHY, *Plaintiffs-Intervenors-Appellants,* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; and the CONFEDERATED SALISH and KOOTENAI TRIBES, *Defendants-Appellees.*	No. 96-35505 D.C. No. CV-95-00056-CCL OPINION

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,	No. 96-35508
Plaintiffs-Appellants,	
v.	D.C. No. CV-95-00056-CCL
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States EPA; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,	
Defendants-Appellees.	

Appeals from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted
September 8, 1997 – Seattle, Washington

Filed March 3, 1998

Before: Mary M. Schroeder and Robert R. Beezer, Circuit Judges and William W Schwarzer,* District Judge.

Opinion by Judge Schroeder

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* Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation

COUNSEL

Harley Harris, Assistant Attorney General, Helena, Montana, for plaintiffs-appellants.

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OPINION

SCHROEDER, Circuit Judge:

This case is a facial challenge to regulations the Environmental Protection Agency (EPA) promulgated pursuant to

§ 518(e) of the Clean Water Act, 33 U.S.C. § 1377 (Supp.1997). That section authorizes EPA to permit Indian tribes "to be treated as a state" (TAS) for purposes of promulgating water quality standards (WQS) pursuant to § 303 of the Act. 33 U.S.C. § 1313 (1986). The plaintiffs-appellants, collectively referred to as "Montana," include state and municipal entities who own fee interests in land located within the boundaries of the Flathead Indian Reservation. The Reservation is occupied by the Confederated Salish and Kootenai Tribes. The Tribes, along with EPA officials, are the defendants-appellees.

Montana filed this action attacking EPA's decision to grant TAS status to the Tribes to promulgate WQS that apply to all sources of pollutant emissions within boundaries of the Reservation, regardless of whether the sources are located on land owned by members or non-members of the Tribe. Montana maintained that the regulations permit tribes to exercise authority over non-members that is broader than the inherent tribal powers recognized as necessary to self-governance. *See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989); *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

In addition, Flathead Irrigation District and related entities ("the Intervenors") have sought to intervene as of right in the action although their uses of the land are not sources of emissions regulated by the Clean Water Act.

The district court granted summary judgment to the defendants, and denied intervention by the Intervenors because they lacked any discernible interest in the subject matter of the litigation as required by Rule 24 of the Federal Rules of Civil Procedure. Montana and the Intervenors have each filed a separate appeal. We affirm in both.

BACKGROUND

The Clean Water Act

The Clean Water Act (CWA) prohibits discharges from a point source of any pollutant into waters unless the emission discharge complies with the Act's requirements. *See* 33 U.S.C. § 1311(a). For most discharges, such compliance is achieved by obtaining and adhering to the terms of a National Pollutant Discharge Elimination System (NPDES) permit. *See* 33 U.S.C. § 1342. NPDES permits are issued by EPA or, in those jurisdictions in which EPA has authorized a state agency to administer the NPDES program, by a state agency subject to EPA review. *See* 33 U.S.C. § 1342(b).

Under the NPDES program, each state must adopt WQS for its waters. *See* 33 U.S.C. § 1313. These standards are subject to review and approval by EPA. *See* 33 U.S.C. § 1313(a)-(c). Once WQS have been adopted, EPA will issue an NPDES permit only if the relevant state certifies that any discharges under the proposed permit will be consistent with its WQS. *See* 33 U.S.C. § 1341(a).

In 1987, Congress added § 518(e) to the CWA which authorized EPA to permit tribes "to be treated as a state" (TAS) for purposes of promulgating WQS. 33 U.S.C. § 1377(e). The relevant language of the provision is set forth in the margin.[1]

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[1] The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II . . . to the degree necessary to carry out the objectives to this section, but only if –

EPA issued a final rule in 1991 implementing the provision by setting forth the standards for processing tribal requests for TAS status and concomitant authority to institute WQS. *See Environmental Protection Agency*, 56 Fed.Reg. 64,876 (1991) (codified at 40 C.F.R. § 131.8(b)(3)) (hereinafter Final Rule). The Final Rule was promulgated after notice and comment, during which Montana voiced its objections to the rule as too broad. Conversely, some tribal interests, represented in this case by amici briefs, took the position that the authority was too narrow, and that Congress had in effect delegated the power to the tribes to promulgate WQS. EPA rejected both extremes and promulgated the regulations here at issue:

> 1. The tribe must be federally recognized and exercising governmental authority;
>
> 2. The tribe must have a governing body carrying out "substantial governmental duties and powers;"

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

> 3. The water quality standards program which the tribe seeks to administer must "pertain to the management and protection of water resources," which are "within the borders of an Indian reservation;"
>
> 4. The Indian tribe is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act and regulations.

40 C.F.R. 131.8(a).

The third requirement, with which we are principally concerned, is intended to reflect the scope of a tribe's "inherent power," a concept developed by the Supreme Court to define when tribes may engage in nonconsensual regulation of activities of non-members. *See Montana*, 450 U.S. at 565-66, 101 S.Ct. at 1258; *United States v. Wheeler*, 435 U.S. 313, 322, 98 S.Ct. 1079, 1085-86, 55 L.Ed.2d 303 (1978).

To demonstrate authority over the activities of non-members on non-Indian fee lands, EPA requires a tribe to show that the regulated activities affect "the political integrity, the economic security, or the health or welfare of the tribe." Final Rule, 56 Fed.Reg. at 64,877 (quoting *Montana*, 450 U.S. at 566, 101 S.Ct. at 1258). The potential impacts of regulated activities on the tribe must be "serious and substantial." *Id.* at 64,878.

EPA believes that tribes will normally be able to demonstrate that the impacts of regulated activities are serious and substantial due to "generalized findings" on the relationship between water quality and human health and welfare. *See id.* Nonetheless, under the Final Rule

EPA will make a case-specific determination on the scope of each tribal applicant's authority. *See id.* Because EPA's generalized findings will be incorporated into the analysis of tribal authority, the factual showing required under § 131.8 is limited to the tribe's assertion that (1) there are waters within the reservation used by the tribe, (2) the waters and critical habitat are subject to protection under CWA, and (3) impairment of waters would have a serious and substantial effect on the health and welfare of the tribe. *See id.* at 64,879.

Once the tribe meets this initial burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality, presume that there has been an adequate showing of tribal jurisdiction over fee lands. *See id.* Unless the party objecting demonstrates the tribe's lack of jurisdiction, the EPA will determine there is inherent authority. *See id.*

THE FLATHEAD RESERVATION APPLICATION AND APPROVAL FOR TAS STATUS

In 1992, the Tribes applied for TAS status with respect to all surface waters within the Flathead Indian Reservation. The Flathead Indian Reservation in Montana is marked by at least two important characteristics that have shaped this litigation. First, its dominant topical feature is Flathead Lake, a large lake that, with its tributaries, provides water for domestic, industrial, and agricultural uses on the lands within the Reservation boundaries. Second, the land within those boundaries reflects a pattern of mixed ownership and control

between tribal and non-tribal entities. These non-tribal entities include the state, the county, and several municipalities that engage in regulated discharges on the Reservation pursuant to existing NPDES permits.

In their application for TAS status, the Tribes identified several facilities on fee lands within the Reservation that have the potential to impair water quality and beneficial uses of tribal waters. These include feedlots, dairies, mine tailings, auto wrecking yards and dumps, construction activities and landfills. Other actual or potential point sources include wastewater treatment facilities, commercial fish ponds and hatcheries, slaughterhouses, hydroelectric facilities and wood processing plants.

Montana opposed granting the Tribes TAS status to the extent such status would extend to reservation lands and surface waters owned in fee by non-members of the Tribes. The EPA director approved the Tribes' application after determining that the Tribes possessed inherent authority over non-members on fee lands. Montana then filed this action.

The Montana Appeal and the Scope of Inherent Authority

In general, absent express authorization by federal statute or treaty, Indian tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation. *See Montana*, 450 U.S. at 564, 101 S.Ct. at 1258. *See also Strate v. A-1 Contractors*, ___ U.S. ___, ___, 117 S.Ct. 1404, 1409, 137 L.Ed.2d 661 (1997) (reaffirming). The Court in *Montana* noted, however, that in certain circumstances, even where Congress has not expressly authorized it, Indian tribes retain inherent sovereign

power to exercise civil jurisdiction over non-Indians on fee lands. *See Montana*, 450 U.S. at 566, 101 S.Ct. at 1258. The first exception to the general rule relates to non-members who enter consensual relationships with the tribe or its members. *See id.* at 565, 101 S.Ct. at 1258. The second exception concerns conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 556, 101 S.Ct. at 1258.

Although the Supreme Court has applied the *Montana* rule in subsequent cases, the Court's 1989 fractured decision in *Brendale*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343, left some confusion as to what the correct standard should be. *Brendale* involved the authority of tribes to zone non-Indian fee land. Although the Justices disagreed over how to apply *Montana's* second exception in that context, a majority of the Justices nonetheless agreed that the *Montana* rule controlled. *Id.* Later, in *Strate*, a unified court reaffirmed the vitality of *Montana*. In *Strate*, which was after the district court decision in this case, the Court stressed that there must be a nexus between the regulated activity and tribal self-governance in order for the second *Montana* exception to apply. *See Strate*, at ___, 117 S.Ct. at 1416.

Montana's position in the district court and in this court has been that EPA got the scope of inherent authority wrong, and that the Tribes should be able to engage in nonconsensual regulation of non-tribal entities only when all state or federal remedies to alleviate threats to the welfare of the tribe have been exhausted and have proved fruitless. Their brief relies heavily upon the opinions of Justices Stevens and White in *Brendale* to argue that the

Brendale decision effectively repudiated the *Montana* standard. That standard, in appellants' view, had erroneously equated tribal sovereignty with local government police power.

We agree with appellants insofar as they contend that the scope of inherent tribal authority is a question of law for which EPA is entitled to no deference. EPA's decision to adopt inherent tribal authority as the standard intended by Congress may well be viewed in a deferential light because the statute's language and legislative history were not entirely clear. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984). EPA's delineation of the scope of that standard, however, has nothing to do with its own expertise or with any need to fill interstitial gaps in the statute committed to its regulation. Therefore, EPA's delineation of the scope of tribal inherent authority is not entitled to deference.

We cannot agree with appellants, however, that EPA has committed any material mistakes of law in its delineation of the scope of inherent tribal authority. Rather, the agency took a cautious view by incorporating both Justice White's and Justice Stevens' admonitions in *Brendale* that, to support the exercise of inherent authority, the potential impact of regulated activities must be serious and substantial. *See Final Rule*, 56 Fed.Reg. at 64,878; *Brendale*, 492 U.S. at 431, 109 S.Ct. at 3008 (White, J.); *id.*, 492 U.S. at 447, 109 S.Ct. at 3016 (Stevens, J.). Moreover, in Justices Stevens' and White's opinions, upon which Montana relies, there is no suggestion that inherent authority exists only when no other government can act.

Indeed the EPA decision appears to adumbrate the Supreme Court's holding in *Strate*, ___ U.S. ___, 117 S.Ct. 1404, 137 L.Ed.2d 661, that the exercise of tribal jurisdiction over non-tribal members engaged in traffic accident litigation was not necessary to the self-governance of the tribe. We therefore disagree with appellants that *Brendale* overruled *Montana*. The *Strate* decision reaffirms the vitality of *Montana*; *Brendale* did not repudiate it.

EPA's decision, applying its standards in this case, found that the activities of the non-members posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential. We have previously recognized that threats to water rights may invoke inherent tribal authority over non-Indians. "A tribe retains the inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. This includes conduct that involves the tribe's water rights." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (1981) (internal citations omitted, emphasis added). *Colville* also supports EPA's generalized finding that due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation: "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users." *Id.*

In contrast, the tribes in *Strate* reserved no right to exercise control over the federal right-of-way maintained by the state. *See Strate*, at ___, 117 S.Ct. at 1414. Furthermore, the conduct of users of a small stretch of highway

has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the principal water source.

Our decision is also fully consistent with the only other circuit opinion that has yet considered the issue of tribal authority to set water quality standards. *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir.1996). In that case, the tribe had promulgated WQS that were more stringent than federal standards. The city contended that the tribal standards could not be more stringent than federal standards. The court rejected the contention, observing that the authority to establish such standards "is in accord with powers inherent in Indian tribal sovereignty." *Id.* at 423.

Accordingly, we affirm the district court's decision that EPA's regulations pursuant to which the Tribe's TAS authority was granted are valid as reflecting appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members.

THE INTERVENORS' APPEAL

The Intervenors consist of the Flathead Joint Board of Control, two irrigation districts, and four individual irrigators who own land in fee situated within the boundaries of the Reservation. None of the proposed intervenors, however, holds an NPDES permit that may potentially be modified due to any change in WQS imposed by the Tribes.

To prevail on a motion to intervene as of right, the intervenor must (1) make a timely motion, (2) claim a

"significantly protectable" interest in the property that is the subject of the action, (3) demonstrate impairment of its ability to protect that interest, and (4) prove that the interest is inadequately represented by the parties to the action. *See Sierra Club v. EPA,* 995 F.2d 1478, 1481 (9th Cir.1993).

The district court held that because the Intervenors do not hold NPDES permits, the transfer of the right to establish WQS from the state to the Tribes "will have no immediate or any foreseeable, demonstrable effect upon the proposed intervenors." In their briefs to this court, the Intervenors attempt to state a broader interest in the enforcement process by suggesting that the imposition of standards promulgated by the Tribes would violate their civil rights by subjecting them to tribal jurisdiction. They also argue that EPA approval of tribal WQS would depress the value of their property.

Because the Intervenors hold no NPDES permits they could not be subject to NPDES enforcement proceedings. Moreover, TAS status does not confer enforcement authority on the Tribes; it only enables the Tribes to set the standards. Even if the Tribes applied for enforcement authority, the NPDES permits would still be issued by EPA and enforced in federal, not tribal, courts. Finally, even assuming that EPA's approval of the tribal WQS program might affect property values, such a speculative and purely economic interest does not create a protectable interest in litigation concerning a statute that regulates environmental, not economic, interests. *See Portland Audubon Soc'y v. Hodel,* 866 F.2d 302, 309 (9th Cir.1989) (an adverse economic impact does not create a significant

protectable interest in litigation under the National Environmental Policy Act); *see also Sierra Club,* 995 F.2d at 1485-86 (city that holds permit under CWA has a protectable interest in CWA litigation that might affect a city's discharge from permitted operations).

CONCLUSION

The district court correctly entered summary judgment in favor of the defendants on the underlying challenge to the grant of TAS status to the Tribes, and it also correctly denied the Intervenors' application to intervene as of right. Its judgment is AFFIRMED.

STATE OF MONTANA; Lake County, Montana, a political subdivision of the State of Montana; City of Ronan, Montana, a municipality of the State of Montana; and Town of Hot Springs, Montana, a municipal corporation, Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; Carol Browner, Administrator of the United States Environmental Protection Agency; and the Confederated Salish and Kootenai Tribes, Defendants.

No. CV 95-56-M-CCL.

United States District Court,
D. Montana,
Missoula Division.

March 27, 1996.

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of Control, Mission Irrigation District, Jocko Valley Irrigation District, Flathead Irrigation District, Ross Middlemist, Wayne W. Maughan, William Slack, Glenn Murphy.

OPINION AND ORDER

LOVELL, District Judge.

Before the court is a motion to intervene filed by the Flathead Joint Board of Control, the Mission Irrigation District, the Jocko Valley Irrigation District, the Flathead Irrigation District, Ross Middlemist, Wayne Maughan, William Slack, and Glenn Murphy. The Defendants oppose the motion, but Plaintiff consents to the intervention. Also before the court are cross motions for summary judgment.

1. Background.

In July, 1993, the Confederated Salish and Kootenai Tribes (the "Tribes") submitted a completed application for treatment-as-state ("TAS") status under section 303, 33 U.S.C. § 1313, of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1987 & 1995 Cum.Supp.), with respect to all surface waters within the Flathead Indian Reservation (the "Reservation"). The Environmental Protection Agency ("EPA") notified the State of Montana ("Montana") of the Tribes' application pursuant to 40 C.F.R. § 131.8(c)(2). Montana timely filed its comments regarding the application in accordance with 40 C.F.R. § 131.8(c)(3). Montana opposed the EPA granting the Tribes TAS status on the ground that the Tribes do not possess inherent civil regulatory authority over lands

owned by nonmembers. Montana also contested factual assertions made by the Tribes in its application and requested an evidentiary hearing through which Montana could contest the Tribes' factual allegations. Because only Montana was considered an "appropriate governmental entity" entitled to make comments on the Tribes application, *see* 56 Fed.Reg. 64876, 64884 (December 12, 1991), the local government Plaintiffs and the proposed intervenors submitted their comments through Montana. All public comments were considered by the EPA before reaching its decision. *See* Decision Document, p. 7, AR # 27.

On February 27, 1995, the Director of EPA Region VIII approved the Tribes' application to establish water quality standards for surface waters within the Reservation under section 303 of the CWA. The EPA found that Montana did not rebut the presumption created by the Tribes' showing that pollution of surface waters traversing or appurtenant to nonmember land would have serious and substantial impact on the Tribes' health and welfare. On March 28, 1995, the Tribes adopted water quality standards for all surface waters on the Reservation.[1] The Tribe has submitted those standards to the EPA for approval in accordance with section 303(c) of the CWA.

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[1] The court notes that, according to the EPA Regional Administrator, the water quality standards actually adopted by the Tribes are "virtually identical" to the water quality standards set by Montana. *See* Letter of William P. Yellowtail to Senator Conrad Burns, Exhibit 2, Reply Brief in Support of Motion to Intervene.

2. Pleadings.

Plaintiffs filed their first amended complaint for declaratory and injunctive relief on June 8, 1995. Plaintiffs invoke the court's jurisdiction pursuant to the Administrative Procedures Act, 5 U.S.C. § 702.

(a) Plaintiffs' complaint.

Montana holds a permit that allows discharges into Flathead Lake from the State's Yellow Bay research facility. Montana's permit was issued by the State under the Montana Pollutant Discharge Elimination System ("MPDES"). Mont.Code Ann. § 75-5-605(2) (1994); Mont.Admin.R. 16.20.1300-.1347. Montana believes that because the EPA has decided to grant the Tribes treatment-as-state (TAS) status, the State will now be required to seek an additional permit from the EPA under its National Pollutant Discharge Elimination System ("NPDES") program. *See* 33 U.S.C. § 1342.

Lake County owns a wastewater treatment facility on the Reservation, which makes discharges into Post Creek. Lake County already holds an NPDES permit issued by the EPA.

The City of Ronan owns a wastewater treatment facility on the Reservation, which makes discharges into Crow Creek. Ronan holds an MPDES permit issued by the State of Montana. Ronan alleges that EPA is now requiring it to obtain an NPDES permit.

The Town of Hot Springs owns a wastewater treatment facility within the Reservation, which makes discharges into Hot Springs Creek. Hot Springs holds an

MPDES permit issued by the State of Montana. Hot Springs alleges that EPA is now requiring it to obtain an NPDES permit.

Plaintiffs' First Claim for Relief asserts that the EPA's final decision is based upon an erroneous application of legal principles relating to the Tribes' inherent regulatory authority and that the interested parties were not granted an evidentiary hearing attacking the facts upon which the agency decision was based. Furthermore, Plaintiffs state that the final decision improperly subjects them to the civil regulatory authority of the Tribes and infringes on Montana's authority under section 401 of the CWA.[2] Montana concludes that the EPA's decision to grant TAS status to the Tribes has or will in the future result in the State of Montana being deprived of its authority as a state under section 401 of the CWA.

Plaintiffs' Second Claim for Relief asserts that the Tribes are without authority to rely on the agency action for the purpose of regulating Plaintiffs' activities on the Reservation.

The Plaintiffs request a declaratory judgment that determines that the agency action granting TAS to the

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[2] Under section 401, 33 U.S.C. § 1341, the relevant state must certify to the EPA that a proposed NPDES permit will be in compliance with state's water quality standards. Of course, because the Tribes have been granted TAS status, Montana is no longer the certifying authority for purposes of section 401. However, whether Montana or the Tribes certifies compliance, in either instance the EPA retains final decision-making authority over the issuance of NPDES permits.

Tribes pursuant to section 518(e) of the CWA was unlawful and that the Tribes are without authority to rely upon the agency action.

(b) EPA's Answer to Plaintiffs' Complaint.

EPA concedes that Yellow Bay's compliance with the CWA is conditioned upon Yellow Bay's application for a NPDES permit if Yellow Bay discharges pollutants from a point source into waters of the United States on the Flathead Reservation.[3] EPA questions who historically considered Yellow Bay to be in compliance with the CWA. Likewise, EPA questions who historically considered Ronan's wastewater treatment facility to be in compliance with the Clean Water Act. EPA also admits that Ronan's compliance with the CWA is conditioned upon Ronan's application for and receipt of a federal NPDES permit if Ronan discharges pollutants from a point source into waters of the United States on the Flathead Reservation. EPA poses a similar question and states a similar admission as to the Town of Hot Springs.

EPA also avers that federal administrative remedies are available to any discharger who is required to obtain a permit from EPA pursuant to section 402 of the CWA. *See* 40 C.F.R. § 122-124 (1995). EPA admits that such a permit may include effluent limitations necessary to meet the water quality standards adopted by the Tribes. However, EPA asserts that it and not the Tribes will retain

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[3] The Tribes' Answer to Plaintiffs' Complaint avers that the Yellow Bay Wastewater Treatment Facility made an application for an NPDES permit on June 19, 1995.

NPDES permitting authority on the Reservation,[4] and that it and not Montana has always held CWA regulatory jurisdiction over the waters of the United States on the Flathead Indian Reservation. The EPA also asserts that the court lacks jurisdiction over Plaintiffs' claims, that the complaint states claims for which relief cannot be granted, that Plaintiffs lack standing, that Plaintiffs' claims are not ripe for review and are not justiciable.

(c) Tribes' Answer to Plaintiffs' Complaint.

The Tribes admit they have waived their sovereign immunity for purposes of accepting service of Plaintiffs' First Amended Complaint. The Tribes assert that Plaintiffs' claims are not within the zone of interests meant to be protected by the Clean Water Act and that Plaintiffs' interest has not been or will not be injured or adversely affected by agency action within the meaning of 5 U.S.C. § 704. The Tribes assert that there is no actual controversy upon which this court may declare the rights and legal relations, and therefore Plaintiffs' claims are not justiciable. The Tribes assert that Montana has failed to timely challenge the 1991 regulations upon which EPA's decision is based; the Tribes assert that Montana's claim is stale since Montana commented on the regulations and/or actively participated in the formulation of those regulations by the EPA. Finally, the Tribes assert that the Plaintiffs have failed to allege facts sufficient to establish a

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[4] *See* EPA's Memorandum in Opposition to JBC's Motion to Intervene, at p. 8.

valid facial challenge to the regulations and policy complained of in Plaintiffs' complaint.

(d) Proposed Plaintiff-Intervenors' proposed complaint.

The JBC and the Irrigation Districts provide water for over one hundred thousand acres of irrigated land,[5] and the water is delivered from the federal Flathead Irrigation and Power Project. Approximately 2,000 farmers and ranchers own this land. Proposed Intervenors bring their complaint pursuant to the APA, 5 U.S.C. § 702. Intervenor Irrigation Districts assert inter alia that they have been granted the power by the Montana Legislature to appropriate water, acquire water rights, acquire reservoirs and dams, and acquire the land for such works. Mont.Code Ann. § 85-7-1904 (1995). The Irrigation Districts also assert that they hold the power to regulate, supervise, apportion and control water distribution. Mont.Code Ann. § 85-7-1922 (1995).

The JBC and the Irrigation Districts have filed numerous lawsuits involving the irrigation system on the Reservation. They have filed water rights claims in the Montana Water Court pursuant to the Montana Water Use Act, Mont.Code Ann. § 85-2-101, et seq. (1995). They have, with Intervenors Middlemist and Maughan, filed

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[5] The Flathead Indian Reservation encompasses some 1.2 million acres, and contains approximately 4,000 natural stream miles. In addition, approximately 1300 miles of irrigation canals and laterals exist under the authority of the Flathead Agency Irrigation Division/Flathead Irrigation Project, Bureau of Indian Affairs, United States Department of the Interior.

suit against the Tribes to contest tribal Ordinance 87A, the Aquatic Lands Conservation Ordinance ("ALCO"). *Middlemist, et al. v. Pablo, et al.*, CV No. 95-68-M-CCL; *Middlemist, et al. v. Pablo, et al.*, No. 95-343- CV (Tribal Court). Without explanation, proposed Plaintiff-Intervenors suggest that this court's decision in this case may have stare decisis or res judicata effect on the ongoing litigation in *Middlemist v. Pablo.*

Proposed Plaintiff-Intervenors Wayne Maughan, Ross Middlemist, William Slack and Glenn Murphy are irrigators and members of the JBC and the Irrigation Districts. They commonly undertake typical irrigation activities in the course of farming and ranching.

Proposed Plaintiff-Intervenors complain that they received no individual notice of the Tribes' application for TAS status because the EPA has specifically excluded individuals and local governments from the TAS notice and comment process. *See* 40 C.F.R. § 131.8(c)(2) (1995); 56 Fed.Reg. at 64884. The EPA notifies, and requests the comments of, only the relevant federal agencies and state and tribal governments. However, the EPA does place an announcement in appropriate newspapers, directing interested parties to submit their comments to the appropriate state government. *Id.* In this case, all public comments submitted through the State of Montana were considered by the EPA.

Proposed Plaintiff-Intervenors assert that the Tribes have previously attempted to recover from the United States certain water rights, hunting and fishing rights, rights to land, and exclusive use and occupation of the reservation. *See* Act of March 13, 1924, 43 Stat. 21; Act of

July 30, 1946, 60 Stat. 715; Act of August 13, 1946, 60 Stat. 1049, Indian Claims Commission Act. Proposed Plaintiff-Intervenors theorize that the Tribes should now be precluded from making additional claims to sovereign authority over nonmember activity on fee land, having foregone such additional claims at earlier opportunities.

Proposed Plaintiff-Intervenors express concern that the Tribes might assert authority over either civil or criminal violations of the CWA. Proposed Plaintiff-Intervenors assert that they cannot receive a fair trial in a tribal court, which trial would, among other things, violate their right to be tried by a jury of their peers. Proposed Plaintiff-Intervenors object to the fact that the Tribes will not permit them to vote, hold office, sit on a jury, or act as tribal judges.

Proposed Plaintiff-Intervenors' First Claim for Relief asserts that the agency action is not in accordance with the law and has aggrieved them within the meaning of 5 U.S.C. § 702. The Second Claim for Relief asserts that the agency action was unlawful because it denied Murphy the opportunity to be heard. The Third Claim for Relief asserts that the agency action was unlawful because it presumed that the Tribes have civil regulatory jurisdiction over Murphy. The Fourth Claim for Relief asserts that the agency action violates the supremacy clause of the United States Constitution in that Congress has previously divested the Tribes of civil regulatory jurisdiction, and EPA cannot now contradict that divestment. The Fifth Claim for Relief asserts that the agency action is unlawful because it divests them of their federal constitutional right to full and equal participation in the government under which they must live.

3. Applicable Statutes and Regulations.

The EPA administers the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1987 & 1995 Cum.Supp.). The CWA was enacted in order to restore and maintain the quality of the Nation's waters, *see* 33 U.S.C. § 1251(a), and it prohibits the discharge from a point source[6] of any pollutant into the waters of the United States unless that discharge complies with the CWA. 33 U.S.C. § 1311(a). The CWA was amended in 1987 by the Water Quality Act of 1987 ("WQA"), P.L. 100-4, 101 Stat. 7. The WQA added a new provision, section 518, which allows the EPA to treat Indian tribes as states for certain purposes of the Act. 33 U.S.C. § 1377(e).

There are two major permit programs in the CWA. Section 402 of the CWA provides the framework for a permitting system for pollution dischargers, known as the National Pollutant Discharge Elimination System ("NPDES"). *See* 33 U.S.C. § 1342. Section 404 of the CWA provides the framework for an Army Corps of Engineers permitting system for discharges of dredged or fill material into the waters of the United States. *See* 33 U.S.C. § 1344.

The permit programs are based upon water quality standards that are set by the states pursuant to section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C). The

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[6] "[A]ny discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "[A]gricultural stormwater discharges and return flows from irrigation" are excluded from the definition of "point source." Id.

CWA requires each state to adopt water quality standards for its intrastate and interstate waters. 33 U.S.C. § 1313(a)-(c). The EPA must approve the water quality standards set by states. 33 U.S.C. § 1313(c)(1), (3). When the EPA is the permitting authority, states have the opportunity to certify whether a discharge under a proposed permit will be consistent with its water quality standards. 33 U.S.C. § 1341. If the state concludes that its water quality standards will not be achieved, then the permit cannot issue unless it is modified to comply with the standards. *Id.*

Irrigation is not an activity regulated by the CWA, which specifically excludes "agricultural stormwater discharges and return flows from irrigated agriculture" from point source regulation. 33 U.S.C. § 1362(14). The CWA does not regulate the extraction or allocation of groundwater or surface water, or any other water quantity right. 33 U.S.C. § 1251(g). Instead, the CWA regulates pollutants added to surface water from point sources. *See* 40 C.F.R. § 122.1(b).

Under section 518(e) of the WQA, the EPA is authorized to treat an Indian tribe in the same manner as a state for certain purposes, including the development of water quality standards. 33 U.S.C. § 1377(e); 40 C.F.R. §§ 131.3-131.8 (1995). Section 518 provides that:

> The Administrator is authorized to treat an Indian tribe as a State for purposes of title II and sections 104, 106, 303, 305, 308, 309, 314, 319, 401, 402, and 404 of this Act [33 U.S.C.S. §§ 1281 et seq., 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344] to the degree necessary

to carry out the objectives of this section, but only if –

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and of all applicable regulations.

Such treatment as a State may include the direct provision of funds reserved under subsection (c) to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to make grants under title II of the Act in an amount not to exceed 100 percent of the cost of a project. Not later than 18 months after the date of the enactment of this section, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this Act. The Administrator shall, in promulgating such regulations, consult affected States sharing common water

bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this Act.

* * *

(h)(1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; and

(2) "Indian tribe" means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

33 U.S.C. § 1377(e), (h) (1987 & Cum.Supp.1995) (emphasis added). The court has reviewed the amicus curiae brief submitted by the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana, whose application to EPA for TAS status is now pending. Amicus counsel asserts, based upon the statutory language emphasized above, that section 518 provides tribes

with federally-delegated tribal jurisdiction over non-Indians. Their reading emphasizes the fact that in section 518(h) Congress expressly included all lands of the Reservation within its definition of the Reservation, "notwithstanding the issuance of any patent," and in section 518(e) Congress expressly specified that the Tribes should manage and protect water resources that are (1) held by an Indian tribe, (2) held by the United States in trust for Indians, (3) held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or (4) otherwise within the borders of an Indian reservation. It appears that the legislative history is ambiguous, although only arguably so since the legislative history relates mainly to concern regarding whether section 518(e) pertains to water quantity rights of non-Indians, which of course it does not.

Congress may delegate such jurisdiction to Indian tribes. *See United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717-18, 42 L.Ed.2d 706 (1975) (affirming federal conviction for violation of tribal liquor ordinance on basis of a federal delegation to the Wind River Tribe of right to regulate liquor trade on reservation). Indeed, the statutory language seems to indicate plainly that Congress did intend to delegate such authority to tribes if the three criteria listed in section 518(e) were met. In fact, in the *Brendale* decision, Justice White, writing for the Court, cited this very statute as an example of an explicit delegation of Congressional authority to Indian tribes. *See Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 428, 109 S.Ct. 2994, 3006-07, 106 L.Ed.2d 343 (1989) (White, J.). This interpretation of sections 518(e) and (h)(1) comports with common-sense, for it seems

highly unlikely that Congress contemplated granting to tribes the authority to set water quality standards for only those segments of streams traversing or appurtenant to Indian lands, while at the same time state water quality standards would remain in effect on the reservation for those same streams where the stream segments traverse or bound non-Indian land. However, EPA determined that it would take the more cautious view, that Congress did not expressly delegate jurisdiction to tribes over non-Indians and that tribes would have to prove on a case-by-case basis that they possess such jurisdiction. *See* 56 Fed.Reg. 64,876, 64,879-80 (1991).

The application regulations are found at 40 C.F.R. § 131.8, adopted by the EPA on December 12, 1991. 56 Fed.Reg. 64895 (Dec. 12, 1991), as amended at 59 Fed.Reg. 64344 (Dec. 14, 1994). § 131.8(a) provides that:

> The Regional Administrator . . . may accept and approve a tribal application for purposes of administering a water quality standards program if the Tribe meets the following criteria:
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> (1) The Indian Tribe is recognized by the Secretary of the Interior . . . ,
>
> (2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers,
>
> (3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a

> member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and
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> (4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.
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> 40 C.F.R. § 131.8(a) (1995).

In the preamble to EPA's Final Rule regarding the procedures by which an Indian tribe may qualify for TAS, the EPA analyzes inherent tribal authority over reservation lands owned in fee by nonmember. 56 Fed.Reg. 64876. Specifically, the EPA analyzes *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989). The EPA adopted an interim operating rule, to be applied on a case-by-case basis, to determine whether an Indian tribe has authority over reservation lands owned in fee by nonmembers. 56 Fed.Reg. at 64878-79.

The EPA's operating rule is based on the second *Montana* exception allowing for tribal authority over nonmember lands: "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66, 101 S.Ct. at 1258. The EPA's operating rule requires a tribe to show that the

"potential impacts of regulated activities on the tribe are serious and substantial." 56 Fed.Reg. at 64878. In other words, the EPA does not require a tribe to wait until a point source discharger located on non-Indian lands is actually polluting tribal waters before the tribe can apply for TAS status; instead, a tribe can simply show that there is a potential for such pollution in the future and were such pollution to occur it would have serious and substantial impacts upon the tribe.

In determining the scope of inherent tribal authority for purposes of section 518(e), the EPA considered the Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (4:2:3 split, deciding that county should have exclusive zoning authority over non-Indian property in predominantly fee area but tribe should have exclusive zoning authority over non-Indian property in predominantly tribal area). The EPA determined that the primary significance of *Brendale* is that its result is consistent with the exceptions stated in *Montana*:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate . . . the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct

> threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66, 101 S.Ct. at 1258 (citations omitted). The EPA interpreted *Brendale* as finding no tribal jurisdiction where the proposed activities "would not threaten the Tribe's . . . health or welfare." *Brendale*, 492 U.S. at 432 (White, J., writing for the Court). EPA concluded that the best policy is to determine tribal authority over nonmember fee lands on a case-by-case basis, by examining potential threats against water quality as they relate to a particular Tribe's health or welfare. EPA noted that in *Brendale* the issue was zoning, whereas in water quality management it is easier to establish effects on tribal health and welfare. *Id.* at 64879.[7] Therefore, the EPA decided to require a showing from each tribal applicant "that the potential impacts of regulated activities on the tribe are serious and substantial." 56 Fed.Reg. at 64878.

In that 1991 rule, however, the EPA reserved to itself the opportunity to take into account environmental statutes and legislative findings regarding the seriousness of water pollution. *Id.* In making a factual finding of impact of a water-related activity on a particular tribe, the EPA

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[7] This is so because zoning impacts are normally discrete and localized, whereas water pollution creates environmental health risks that may affect many people miles from the source. When tribal members use surface water, or take fish or animal resources that use the surface water, pollution from non-Indian lands within the reservation could have a grave impact upon tribal health and environmental interests.

also relies on its special expertise and practical experience in the areas of water management and the impact of clean water on critical habitat. *Id.* The EPA notes that pollutants in surface waters are mobile by nature, and it is impractical to try to separate water quality impairment of tribal waters from impairments of non-Indian waters. *Id.* "EPA believes that a 'checkerboard' system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments." *Id.* In light of the importance of water quality management in protecting public health and safety, and in light of the mobile nature of water pollution, the EPA made a generalized finding that there is a relationship between water quality and tribal health and welfare.

The 1991 rule further determines that in order to meet the requisites of § 131.8, a tribe need only assert that there are waters in the reservation used by the tribe or tribal members, the waters are subject to protection under the CWA, and impairment of those waters by the activities of non-Indians would have a serious and substantial effect on the health and welfare of the Tribe. *Id.* at 64879. At that point, according to the EPA, a tribe has made an adequate showing of tribal jurisdiction over fee lands, and it is up to the competing governmental entity to demonstrate the tribe's lack of jurisdiction. *Id.* Presumably, the competing governmental entity would need to prove that impairment of tribal waters by the activities of non-Indians would not have a serious and substantial effect on the health and welfare of a tribe.

4. Legal Standards on Motion to Intervene.

(a) Intervention as of Right.

The four-part test for intervention as of right under Rule 24(a) is as follows:

> (1) The motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Sierra Club v. Environmental Protection Agency, 995 F.2d 1478, 1481 (9th Cir.1993). The proposed intervenor bears the burden of demonstrating that he is entitled to intervene under Rule 24. Petrol Stops *Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1010 n. 5 (9th Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 639 (1981).

(b) Permissive Intervention.

A court may exercise its discretion to grant permissive intervention when (1) the motion is timely, Rule 24(b); (2) the movant's claim or defense and the main action have a question of law or fact in common, Rule 24(b)(2); and (3) movant has an independent ground of jurisdiction to support permissive intervention. *See Greene v. United States*, 996 F.2d 973, 978 (9th Cir.1993); *see also* 3B Moore's Federal Practice, § 24.18. If proposed intervenors make these three showings, a court may then

utilize its discretion to determine the most fair and most efficient method of handling the case.

5. Discussion of Motion to Intervene.

The EPA Decision Document notes that tribal regulatory jurisdiction over non-members is not being determined for all purposes, but merely for the purpose of setting water quality standards for the Reservation under 40 C.F.R. § 131.8(a)(3). The EPA intends to continue issuing federal permits under section 402 of the CWA (NPDES), which the EPA will then enforce in federal court.

The Defendants contend that the proposed Plaintiff-Intervenors have no "significantly protectable" interest in this litigation. Proposed Plaintiff-Intervenors claim ten separate interests: (1) ownership of real property within the reservation; (2) ownership of water quantity rights within the Reservation; (3) ownership of a water use permit issued by the State of Montana and accompanying right to operate a reservoir within the Reservation; (4) attempted participation in the administrative process for the challenged decision; (5) participation in other litigation allegedly relating to the subject matter of this case; (6) interests in retaining constitutional rights; (7) interests in real property; (8) interests in prior acts of Congress interpreting tribal authority; (9) interest in maintaining JBC and the Districts as local governments; (10) interests in retaining the right to a trial by a jury of their peers for CWA civil violations and the right to participate in the administrative process by which the agency decision was reached.

However, the federal Defendants point out that the proposed intervenors have no special interest in the subject matter of this particular litigation – water quality standards of surface waters of the Flathead Indian Reservation. Because the proposed intervenors' sole interest lies in irrigation, they have no "significantly protectable" interest in this case. The federal Defendants inform the court that none of the proposed intervenors holds an NPDES permit which might potentially be modified due to any change in water quality standards imposed by the Tribes. Therefore, proposed intervenors are not in any way directly affected by the transfer of water quality standards authority from the State to the Tribes. Put another way, the transfer of the right to establish water quality standards from the State to the Tribes will have no immediate or any foreseeable, demonstrable effect upon the proposed intervenors.

In *Sierra Club v. Environmental Protection Agency*, 995 F.2d 1478, the Ninth Circuit concluded that the CWA protects the interest of a person who discharges pollutants pursuant to a NPDES permit, and held that an NPDES permit holder could intervene in a case which might result in stricter permit discharge limits. Here, none of the proposed Intervenors possess an NPDES permit or would in any demonstrable way be affected by the setting of water quality standards by the Tribes. Neither do any of the proposed Intervenors engage in any activity that is regulated by the CWA.[8] Proposed Intervenors' reliance on their possession of a water use permit

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[8] It is conceivable that one or more of the proposed Intervenors could be engaging in regulated activity. *See* 40 C.F.R. § 122.23 (requiring NPDES permit for Concentrated

relating to allocation of reservoir water is of no effect because it has no relationship to the CWA or the issues in this case.

Proposed Intervenors also cite *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir.1993), to support their intervention. However, that appellate panel ruled that certain counties and individuals should have been allowed to intervene in that litigation because their land would be directly affected by the Mille Lacs Band's right to enter their properties for the purposes of hunting and fishing. There is no such clear link in this case.

Proposed Intervenors assert that their interests are significantly protectable, and that the defendants have failed to adequately address their interests. Perhaps that is so because their interests are so vaguely stated. For example, proposed Intervenors assert that any expansion of governmental power by the Tribes causes their property values to drop; thus their purported property interest is in keeping tribal government small.[9] This general

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Animal Feeding Operations). *See also* Appendix B to Part 122, defining Concentrated Animal Feeding Operations as having more than 1,000 slaughter and feeder cattle, 700 mature dairy cattle (milked or dry), 2,500 swine, 500 horses, 10,000 sheep or lambs, etc., confined to a lot not having vegetative growth for at least 45 days per year. However, because none of the proposed Intervenors possesses an NPDES or asserts that he engages in any regulated activity requiring an NPDES permit, the court assumes that none of their farm and ranch operations meets the criteria for a Concentrated Animal Feeding Operation.

[9] Proposed Intervenors present the affidavit of Mr. Stelling, a certified real estate agent/broker and owner of a real estate firm in western Montana. Mr. Stelling concludes that "I am

concept may be accurate, but the interest is vague and attenuated, and there is no statute that entitles proposed Intervenors to bring such a claim.

Similarly vague and confusing is proposed Intervenors interest in protecting their right to trial by jury of their peers. This court cannot fathom what it is in this case that relates to the right to trial by jury of one's peers or in what way this right would be violated.

Proposed Intervenors state that they are also (in other litigation) challenging the Tribes' right to require them to obtain a permit from the Shoreline Protection Office of the Natural Resources Department of the Tribes pursuant to Tribal Ordinance 87A (the Aquatic Lands Conservation Ordinance ("ALCO")). *See Middlemist v. Pablo*, CV 95-68-M-CCL. Proposed Intervenors make the claim that the fact that they are litigating tribal jurisdiction over non-member lands in Middlemist should entitle them to intervene in this litigation. However, proposed Intervenors do not have any apparent interest in permitted discharges of pollutants regulated by the CWA. Furthermore, the EPA's finding of tribal jurisdiction over

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convinced that until and unless the issue of tribal jurisdiction over non-member property is resolved with a finding that they do not have such authority, property values will continue to be lower than comparable lands in other areas." (Stelling Aff., Exhibit 8, Mem.Supp.Interv.) It is apparent that proposed Intervenors believe that their land should have comparable values to off-reservation land. Standing alone, this claim for loss of property value tied to strength of tribal government does not suffice to support intervention as of right, and the cases cited by proposed Intervenors do not support the contention.

surface waters appurtenant to non-member lands is limited to the statutes and regulations in issue in this case.

This court finds that the proposed Intervenors have no significantly protectable interest in the outcome of this litigation and therefore are not entitled to intervene as of right.

As to permissive intervention, this court questions whether proposed Intervenors have any independent grounds of jurisdiction to support their permissive intervention. *See Greene v. United States*, 996 F.2d 973, 978 (9th Cir.1993) (requiring independent grounds of jurisdiction to support permissive intervention). The Administrative Procedures Act does not provide independent jurisdictional basis; it only prescribes standards for reviewing agency action once jurisdiction is otherwise established. *Staacke v. United States Secretary of Labor*, 841 F.2d 278 (9th Cir.1988). Proposed Intervenors have no statutory basis for suit pursuant to the CWA. *See Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1, 15-18, 101 S.Ct. 2615, 2623-25, 69 L.Ed.2d 435 (concluding that Congress intended that no private remedies be implied by the CWA in addition to those expressly provided). However, even if proposed intervenors could establish an independent ground of jurisdiction, this court would not be inclined to grant permissive intervention for the reason that such intervention would be likely to unduly delay or complicate the resolution of this case. Such an intervention would not lead to the fairest and most efficient handling of this case.

6. Cross Motions for Summary Judgment.

(a) Legal Standard.

A party is entitled to summary judgment in its favor if it can "show that there is no genuine issue as to any material fact and . . . [it] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment is particularly appropriate where, as here, review is on the administrative record. *Adams v. United States*, 318 F.2d 861, 865 (9th Cir.1963); *Denison v. Udall*, 248 F.Supp. 942, 944 (D.Ariz.1965) ("there should be no de novo review by this Court, but a determination that the final administrative decision is or is not substantially supported by the administrative record. Therefore, a summary judgment pursuant to [Fed.R.Civ.P. 56] may be granted for either party in response to their cross motions"). *See also Florida Fruit & Vegetable Ass'n v. Brock*, 771 F.2d 1455, 1459 (11th Cir.1985), *cert. denied*, 475 U.S. 1112, 106 S.Ct. 1524, 89 L.Ed.2d 921 (1986) (Summary judgment procedure is "particularly appropriate" in record review cases) (quoting 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2733 (1983)).

(b) Discussion.

The focus of the cross motions for summary judgment is whether the EPA properly interpreted *Montana* and *Brendale* when it concluded that the Tribes could meet the second *Montana* exception. The Plaintiffs assert that the *Montana* test has given way to an open-closed area analysis first enunciated in *Brendale* and repeated in *South Dakota v. Bourland*, 508 U.S. 679, 113 S.Ct. 2309, 124

L.Ed.2d 606 (1993). The parties are in agreement that this court must subject EPA's interpretation of case law to de novo review. *See Arizona Pub. Serv. Co. v. Aspaas*, 69 F.3d 1026, 1031 (9th Cir.1995).

However, in reviewing the final EPA action, this court may not make a de novo determination. Instead, this court must determine whether the EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971); *Rybachek v. Environmental Protection Agency*, 904 F.2d 1276, 1284 (9th Cir.1990). This court's function is to ensure that the agency considered all of the relevant factors and that its decision contained no 'clear error of judgment.' " *Arizona v. Thomas*, 824 F.2d 745, 748 (9th Cir.1987) (citation omitted). This court need not determine that the EPA's construction of the CWA is the only construction possible; instead, this court must determine that EPA's understanding of this CWA provision is sufficiently rational as to preclude this court from substituting its judgment for that of EPA. *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125, 105 S.Ct. 1102, 1107-08, 84 L.Ed.2d 90 (1985). Finally, "[a]n agency's interpretation of its own regulations is entitled to a high degree of deference and will be upheld as long as it is not plainly erroneous or inconsistent with the regulation." *Washington State Health Facilities v. DSHS*, 879 F.2d 677, 681 (9th Cir.1989) (*citing United States v. Larionoff*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977)).

The *Montana* test has been previously applied with regard to civil regulatory jurisdiction of the Tribes over

nonmember lands on the Flathead Reservation. For example, in *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 964 (9th Cir.), *cert. denied*, 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed.2d 291 (1982), a Ninth Circuit panel determined that the Tribes' regulation of nonmember property bordering Flathead Lake under a shoreline protection ordinance was a permissible exercise of tribal authority under second *Montana* exception because there was a potentiality [sic] for serious impacts on the water quality of the lake.

The EPA analyzed relevant case law, including *Montana* and *Brendale*, and determined that the *Montana* test is still utilized by the United States Supreme Court in evaluating tribal regulatory jurisdiction over nonmember lands. The EPA declined to interpret section 518(e) as a direct grant of regulatory authority to tribes, although there are some who do interpret section 518(e) in that fashion.[10] Instead, the EPA determined that it would examine tribal authority on a case-by-case basis. In the case of the Tribes, the EPA found sufficient facts to support the Tribes' claim that pollution of the surface waters traversing or appurtenant to non-member land would have serious and substantial impact on the Tribes' health and welfare. Such fact finding by the EPA is entitled to substantial deference. *Arkansas v. Oklahoma*, 503 U.S. 91, 112, 112 S.Ct. 1046, 1060, 117 L.Ed.2d 239 (1992); *Central Arizona Water Cons. Dist. v. Environmental Protection Agency*, 990 F.2d 1531, 1539-40 (9th Cir.), *cert. denied*, 510

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[10] *See* 56 Fed.Reg. 64879-80. *See also* Brief Amicus Curiae of the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana.

U.S. 828, 114 S.Ct. 94, 126 L.Ed.2d 61 (1993). Even if alternative findings could be supported by the administrative record, the EPA's factual findings should be upheld if they are supported by the administrative record. *Arkansas v. Oklahoma*, 503 U.S. at 112, 112 S.Ct. at 1060.

Nevertheless, Plaintiffs assert that the EPA' reading of *Montana* and *Brendale* leads to an erroneous legal determination that the Tribes possess inherent regulatory jurisdiction over nonmember lands within the Reservation. Their reading of *Brendale* and *Bourland*,[11] in particular, leads them to the conclusion that inherent tribal jurisdiction exists only when there is a vacuum of state or federal remedies. However, both *Brendale* and *Bourland* support the continuing validity of the *Montana* test, and in *Brendale* the Supreme Court used the *Montana* test to determine that the tribe did have regulatory jurisdiction over the the [sic] *Brendale* property. Three Justices in *Brendale* supported the continued use of the *Montana* test. 492 U.S.

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[11] *South Dakota v. Bourland*, 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993). In *Bourland*, the Cheyenne River Sioux Tribe sought to regulate hunting and fishing activities of non-Indians on the Oahe Reservoir, a federal facility within the exterior boundaries of their reservation. The opinion cites *Montana's* general rule that the opening of Indian lands causes a tribe to lose its treaty-based right to regulate non-Indian activities. However, *Bourland* also goes on to cite the *Montana* exception allowing for regulation of activities that threaten or directly impact the political integrity, economic security, or health and welfare of the tribe. Finally, the *Bourland* opinion remanded the case back to the circuit court for review of the district court's findings regarding the impact of non-Indian activities on tribal health and welfare.

at 462, 109 S.Ct. at 3024 (Opinion of Blackmun, J.). Four other Justices support the use of a modified *Montana* test that would require the tribe to show that there would be "demonstrably serious impacts" on the tribe. *Id.* at 428-32, 109 S.Ct. at 3006-09 (Opinion of White, J.).[12] Only two Justices advocated distinguishing between open and closed areas. *Id.* at 440-44, 109 S.Ct. at 3013-15. (Opinion of Stevens, J.).

The Supreme Court subsequently considered *Brendale* in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 266-67, 112 S.Ct. 683, 692-93, 116 L.Ed.2d 687 (1992), and stated that Justice White's opinion (requiring "demonstrably serious impacts") is consistent with the test enunciated in *Montana*. Because Justice White's opinion in *Brendale* essentially set a stricter standard for the *Montana* test, EPA determined that it would apply that stricter standard to any tribe applying for TAS status.

The EPA also made several generalized findings in its regulations:

> 1. The CWA constitutes a congressional finding that impacts to water quality give rise to impacts to human health and welfare.
>
> 2. Water quality standards must take into consideration public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes.

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[12] It is noteworthy that Justice White cites TAS status under the CWA as providing an example of an express Congressional delegation of tribal regulatory authority over non-Indian lands. *Brendale*, 492 U.S. at 428, 109 S.Ct. at 3006-07.

3. Because of the mobile nature of pollutants, it is impractical to regulate stream segments according to the member/nonmember checkerboard.

EPA's expertise and experience in making these determinations is not to be treated lightly. Also, the EPA's environmental regulatory policy is to avoid administrative complexity such as checkerboarding and fractionalizing of reservations into trust and fee lands. This regulatory policy serves as a foundation for EPA's Indian policy, which calls for a lead role for tribal governments in managing programs to protect the reservation environment and its populace. *See* EPA Policy for the Administration of Environmental Programs on Indian Reservations, (Nov. 8, 1984). This court should defer to the EPA's expertise and experience when it reconciles its environmental policy with its Indian policy. *State of Wash., Dept. of Ecology v. EPA*, 752 F.2d 1465, 1469 (deferring to EPA' reconciliation of environmental policy and Indian policy in finding that states lack authority to administer Resource Conservation and Recovery Act on Indian reservation).

The EPA also made a specific finding as to the Tribes' inherent jurisdiction over surface waters traversing or appurtenant to nonmember lands within the Reservation. The EPA affirmed that the Tribes require clean water for a domestic water supply and to maintain fish, aquatic life and other wildlife for both subsistence and cultural reasons. Because the Tribes had explicitly asserted that impairment of tribal waters by activities of non-members would have a serious and substantial effect on the health and welfare of the Tribes, and because that assertion corresponded to the EPA's generalized findings, the EPA

found that the Tribes' possess inherent authority to set water quality standards for all surface waters within the Reservation. The EPA also found that the State failed to demonstrate that such authority was lacking. The EPA's finding was also based upon numerous instances of regulated activities occurring on nonmember lands that caused serious and substantial impacts of the Tribes' water resources, including discharges from an RV park and campground, discharges from sewage treatment plants, discharges from a town's storm drains, leakage from gasoline service stations, diesel fuel spills, and gas tank overflows.

7. Conclusion.

On the basis of the foregoing description of the EPA's reasoning and findings, and after careful consideration of the arguments of the parties and review of the administrative record, this court finds that the EPA's final decision is supported by the administrative record, consistent with EPA's regulations, and not contrary to law, and should be upheld. Accordingly,

IT IS HEREBY ORDERED:

1. Proposed Intervenor's motion for leave to file memorandum of supplemental authorities (Docket #30) is GRANTED.

2. Defendant Tribes' motion for summary judgment (Docket #47) and Defendant EPA's motion for summary judgment (Docket #43) are GRANTED.

3. Plaintiffs' motion for summary judgment (Docket #45) is DENIED.

4. Defendant Tribes' motion to strike initial brief of intervenor and motion for summary judgment (Docket #47) is GRANTED.

5. Defendant Tribes' motion for leave to file errata to brief in support of Tribes' motion for summary judgment (Docket #53) is GRANTED.

6. Proposed Intervenors' motion for leave to file response brief to initial briefs (Docket #57) is DENIED.

7. Proposed Intervenors' motion for leave to file reply brief and initial brief nunc pro tunc (Docket #64) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' complaint is DISMISSED and all relief is denied.

The Clerk is directed forthwith to notify the parties and the proposed Intervenors of entry of this order.

(Logo) UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION VIII
999 18th STREET - SUITE 500
DENVER, COLORADO 80202-2466

FEB 27 1995

Ref: 8WM-WQ

Michael Pablo, Chairman
Confederated Salish and Kootenai Tribal Council
P.O. Box 278
Pablo, MT 59855

Dear Chairman Pablo:

I am pleased to inform you that the Agency approves the Confederated Salish and Kootenai Tribes' (CSKT) application to administer a Clean Water Act (CWA) § 303(c) water quality standards program. Our approval is based on the Agency's determination that the Tribes meet the criteria for program approval found at 40 CFR 131.8(a). Please note that the scope of our approval is limited to administration of a CWA § 303(c) water quality standards program within the exterior boundaries of the Flathead reservation (i.e. all lands including non-Indian owned lands). Pursuant to the federal water quality standards regulation at 40 CFR 131.4(c), one additional effect of our approval is that the CSKT may also issue water quality certifications consistent with CWA § 401. This approval does not provide any additional implementation authorities (e.g. permitting, enforcement) beyond the water quality standards and water quality certification programs.

In approving the Tribes § 303(c) Application, we recognize that the State of Montana has raised concerns of due process and participation of the non-Indian community within the Reservation in water quality matters that affect them. We are pleased that in your June 13, 1994 correspondence with Governor Racicot and during our December, 1994 meeting with EPA Assistant Administrator for Water, Robert Perciasepe, you expressed strong interest in developing a cooperative agreement that recognizes this concern. Such an agreement would recognize at the outset the CSKT authority to set water quality standards and is consistent with the way in which you provided joint Indian and non-Indian representation to implement shoreline management of Flathead Lake. I appreciate your willingness and commitment to develop a program which responds to concerns regarding participation of non-Indian peoples within the reservation.

EPA looks forward to working with the Confederated Salish and Kootenai Tribes in the development, adoption, and triennial review of water quality standards for surface waters of the Flathead reservation. EPA also commends the Tribes for the commitment to the environment that is demonstrated by the Tribes' existing water quality program and your fine professional staff.

If you have questions regarding the water quality standards program please feel free to contact Dr. Robert Erickson at (303) 293-1566 or Bill Wuerthele, EPA Region VIII Water Quality Standards Coordinator, at (303)

293-1586. I thank you for your cooperation and patience in this matter.

Sincerely,

/s/ William P. Yellowtail
William P. Yellowtail
Regional Administrator

cc: Sam Morigeau, Director, CSKT Natural Resources Department

DECISION DOCUMENT:
APPROVAL OF CONFEDERATED SALISH AND KOOTENAI TRIBES
APPLICATION FOR TREATMENT AS A STATE
UNDER SECTION 303 OF THE CLEAN WATER ACT

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A. Basis for Finding

1. Relationship of water quality and beneficial uses to the health and welfare of the Tribes and tribal members.

2. Relationship of tribal lands to fee lands and tribal waters.

3. Kinds of water quality degradation that originate on fee lands and have potential impacts on tribal waters that are serious and substantial.

4. Examples of actions originating on fee lands that have potential impacts on the water quality and beneficial uses of tribal waters that are serious and substantial.

5. Beneficial uses that may not be protected.

6. Degradation of tribal waters.

B. Finding

I. *Introduction*

A. **Purpose:** The purpose of the Decision Document is to provide the basis and supporting information for EPA's decision to approve the April 22, 1992 Treatment as a State (TAS) Application of the Confederated Salish and Kootenai Tribes (Tribes) to administer Section 303(c) (Water Quality Standards program) of the Clean Water Act (CWA). The approval applies to the administration of the water quality standards program for waters that lie within the exterior borders of the Flathead Reservation.

B. **Application:** The Tribes' Application for Treatment as a State under Section 303 of the CWA consists of three documents:

1) the Tribe's 303 application, dated April 22, 1992;

2) pages 47 through 85 of Volume I of the Tribes Application for Treatment as a State under Section 404 of the CWA, dated June 22, 1990, and incorporated by reference into the Tribe's 303 application; and

3) an Addendum to the Confederated Salish and Kootenai Tribe's Application for Treatment as a State under Section 303 and 404 of the CWA, dated July 13, 1993.

C. **Chronology of Events**

1. June 22, 1990 – Application for Treatment as a State under Section 404 by the Confederated Salish and Kootenai Tribes.

2. April 22, 1992 – Application for Treatment as a State under Section 303 by the Confederated Salish and Kootenai Tribes.

3. July 13, 1992 – Addendum to Confederated Salish and Kootenai Tribes Application for Treatment as a State under Sections 303 and 404 of the CWA.

4. July 27, 1993 – Letter from Region VIII Acting Administrator Jack McGraw to Michael T. Pablo, Chairman, Confederated Salish and Kootenai Tribes. Application for Treatment as a State under CWA Section 303 considered by EPA to be complete insofar as all required elements are included.

5. July 27, 1993 – Letters to "Appropriate federal entities" from Acting Region VIII Administrator, Jack McGraw:

   a. U.S. Corps of Engineers (US COE), Omaha, Nebraska

b. Flathead National Forest (USFS)

c. Area Director, Bureau of Indian Affairs (US BIA)

d. Supervisor, Lolo National Forest (USFS)

e. State Supervisor, Montana State Office, U.S. Fish and Wildlife Service (US FWS)

6. August 17-September 9 – Responses from "Appropriate federal entities" to Jack McGraw, Acting Region VIII Administrator.

   a. August 17, 1993 – USFS Response, Lolo National Forest

   b. September 23, 1993 – Flathead National Forest

   c. August 19 and September 2, 1993 – COE Response

   d. September 9, 1993 – USFWS Response

7. August 20-22, 1993 – Publication of Notice for Confederated Salish and Kootenai Tribes Application to be treated as a state for purposes of Section 303 of the CWA (*The Missoulian*, Missoula, Montana).

8. September 16, 1993 – Response by State of Montana to Application for Treatment as a State by the Confederated Salish and Kootenai Tribes to Jack McGraw, Acting Regional Administrator, Region VIII. (Included comments from the public.)

9. September 27, 1993 – Letter from Region VIII Acting Administrator Jack McGraw to the Honorable Marc Racicot, Governor, State of Montana, regarding Confederated Salish and Kootenai Treatment as a State under Section 303 of the CWA.

10. November 9, 1993 – Letter to Bob Erickson, Region VIII, Water Quality Branch, from Rhonda Swaney, Natural Resources Dept. Head, The Confederated Salish and Kootenai Tribes. Submission of Draft Flathead Reservation Water Quality Standards and request for technical review.

II. *Requirements for TAS Approval:* Under Section 518(e) of the CWA and EPA's implementing regulation at 40 CFR Section 131.8 four requirements must be satisfied before EPA can approve a tribe's application to administer a water quality standards program under Section 303(c). These are: (1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in Section 131.3(k) and (1); (2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers; (3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the border of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and (4) The Indian Tribe is reasonably expected to be capable, in the Regional

Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

A. **Federal Recognition:** The Confederated Salish and Kootenai Tribes are a recognized tribe by the U.S. Department of the Interior (58 Fed. Reg. 54364, 54366, October 21, 1993).

B. **Substantial governmental duties and powers:** Analysis under 40 C.F.R. Section 131.8(a)(2). The Agency is satisfied that the Salish and Kootenai Tribes (Tribes) of the Flathead Reservation have a tribal Government currently carrying out substantial governmental duties and powers over a defined area and that the Tribes have met the requirements imposed by 40 C.F.R. Section 131.8(a)(2) for treatment as a state under Section 303 of the CWA (CWA).

Background: 40 C.F.R. Section 131.8(a)(2) requires that the "Indian Tribe has a governing body carrying out substantial governmental duties and powers."

The Tribes' descriptive statement demonstrating that the tribal governing body is currently carrying out substantial governmental duties and powers over a defined area is found at pages 47 through 85 of Volume I of the Tribes' Application for treatment as a state under Section 404, dated June 22, 1990, incorporated by reference into Volume I of the Tribes' Application for treatment as a state under Section 303, dated April 22, 1992.

The Statement adequately: (1) describes the form of tribal government; (2) describes the

types of governmental functions currently performed by the tribal governing body; and (3) identifies the source of the tribal government's authority to carry out the governmental functions currently being performed.

The tribal Government was organized pursuant to the Indian Reorganization Act in 1935, with its governmental functions conducted in accordance with the powers and duties delineated in the tribal Constitution. The tribal Government and its departments engage in a variety of governmental functions, from natural resources to human resources. These are described in detail in the exhibits to Volume I of the Tribes' 404 Application, with additional descriptive information contained in Volume I of the Tribes' 303 Application, referenced above.

In addition, it should be noted that the Tribes previously received approval on September 25, 1989 for treatment as a state under Section 106 of the CWA, at which time the Agency made a determination that the Tribes have "a governing body carrying out substantial governmental duties and powers."

C. **Jurisdiction over "waters within the borders" of the Flathead Reservation:** Analysis under 40 C.F.R. Section 131.8(a)(3).

The Agency is satisfied that the Salish and Kootenai Tribes (Tribes) of the Flathead Reservation have adequate jurisdiction to set water quality standards for waters within the exterior boundaries of the Reservation and have adequately demonstrated that they meet the requirements imposed by 40 C.F.R. Section

131.8(a)(3) for treatment as a state under Section 303 of the CWA (CWA).

Background: 40 C.F.R. Section 131.8(a)(3) requires that "the water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are . . . within the borders of the Indian reservation." The program for which the Tribes are applying pertains to the management and protection of water resources which are within the borders of the Flathead Reservation, and this approval is limited to waters within the borders of the Reservation.

It should be noted that EPA is not today determining the scope of the Tribes' regulatory enforcement authority for all purposes. EPA is today finding that the Tribes have sufficient authority to determine the water quality standards for the Reservation. While the Tribes may, in an independent action, enforce tribal water quality standards, an EPA approved water quality standards program need not be implemented through enforcement in tribal court. For example, EPA may issue federal permits under Section 402 of the CWA, based upon tribal water quality standards. Such permits would then be enforced in federal court.

The Tribes' assertion of civil regulatory jurisdiction within the Flathead Reservation is contained in three documents: (a) Volume I of the Tribes' application for treatment as a state under Section 303, dated April 22, 1992, (b) Volume I of the Tribes' 404 Application, dated June 22, 1990, at pages 47 through 85, incorporated by reference into document (a), above,

and, (c) Addendum to Confederated Salish and Kootenai Tribes Application for Treatment as a State under Sections 303 and 404 of the CWA, July 13, 1993.

These documents were forwarded to the U.S. Forest Service (USFS), the U.S. Army Corps of Engineers (COE), the U.S. Fish and Wildlife Service (USFWS), the Bureau of Indian Affairs (BIA) and the State of Montana for comment on the Tribes' jurisdictional assertions, pursuant to 40 C.F.R. Section 131.8(c)(2). These entities responded on August 17 and September 23, 1993 (USFS), August 19 and September 2, 1993 (COE), September 9, 1993 (USFWS), and September 16, 1993 (State of Montana). As the State of Montana raised a competing or conflicting claim, the Region 8 Office of Regional Counsel and the Office of General Counsel consulted by telephone with the Office of the Solicitor of the Department of the Interior (DOI) on January 24, 1994 and May 31, 1994, pursuant to 40 C.F.R. Section 131.8(c)(4).

The Montana Operations Office of EPA Region 8 also published a local newspaper notice of the Tribes' application, inviting the public to submit comments through the State of Montana. Numerous public comments were received by EPA as attachments to the State's letter of September 16, 1993, and the public comments were duly considered by the Agency before reaching this decision.

Tribal Jurisdiction: Having reviewed the jurisdictional assertions of the Tribes and the comments received from other Federal Agencies and the State of Montana (including public comments), and having consulted with DOI,

the Agency has determined that the Tribes have demonstrated adequate jurisdiction to establish water quality standards within the exterior boundaries of the Flathead Reservation.

Tribal authority over Reservation lands other than fee lands owned by non-tribal members. With regard to Reservation lands other than fee lands owned by non-tribal members, the Agency agrees with the Salish and Kootenai Tribes that under well-established principles of Federal Indian law, the Tribes have inherent authority to establish water quality standards. Indeed, the State of Montana only contests the Tribes' assertion of authority over fee lands.

Tribal authority over Reservation lands owned in fee by non-tribal members.

Standard: In the preamble to the amendments to the Water Quality Standards Regulation, published on December 12, 1991 at 56 Fed. Reg. 64876, the Agency set forth its analysis of the scope of inherent tribal authority over reservation lands owned in fee by nonmembers. In that discussion, the Agency considered relevant case law, including *Montana v. United States,* 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Nation,* 492 U.S. 408 (1989), and elected to adopt an interim operating rule" (56 Fed. Reg. at 64878-79) for determining, on a case by case basis, whether an Indian Tribe has authority over reservation lands owned in fee by nonmembers (fee lands).

The operating rule is based on the finding in *Montana* that "a tribe may also retain inherent

power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66. The operating rule requires a further showing that the "potential impacts of regulated activities on the tribe are serious and substantial." 56 Fed. Reg. at 64878.

The State of Montana's comments did not provide data pertaining to the Tribes' assertions that impairment of waters on reservation fee lands may have effects on the health and welfare of the Tribes that are serious and substantial. Since the Tribes' submittal met the initial requirements imposed on them by the regulation, the State submittal should have presented any available data demonstrating that impairment of waters by activities on fee lands would not have potential effects on the health and welfare of the Tribes that are serious and substantial. 56 Fed. Reg. 64879. EPA carefully evaluated the State's submission and determined that the State did not provide information that would cause the Agency to conclude that the Tribes' assertions were unsupported.

The State contended that it had no opportunity to submit facts contesting the Tribes' assertion. However, as provided by the regulation, the State was provided notice as to the substance of the Tribes' assertion of authority and was given thirty days within which to submit information sufficient to establish a competing

or conflicting claim under the applicable regulation. 40 CFR Section 131.8(c)(2)-(4). The State did not submit such information.

Accordingly, having considered the arguments the State submitted, and having consulted with DOI on these questions, EPA has concluded: 1) that the Tribes have demonstrated that they possess the requisite regulatory jurisdiction, and 2) that the State has not established that the Tribes lack jurisdiction.

The State also asserts that the jurisdictional test established in the preamble to the regulation is not proper. EPA, having consulted with DOI, does not agree.

The State's position is that EPA should apply the general rule established in *Montana v. United States,* 450 U.S. 544 (1981), that the Tribes lack jurisdiction on fee lands and the exceptions to that rule apply only in "narrow, fact-based circumstances." In fact, EPA's operating rule, established and discussed at 56 Fed. Reg. 64878-79, was based upon the principles set forth in the *Montana* case. In adopting its operating rule, the Agency reviewed the Supreme Court's decision in *Brendale v. Confederated Bands and Tribes of the Yakima Nation,* 492 U.S. 408 (1989) and determined that the holding of the Court in *Brendale* was consistent with the *Montana* test. In the subsequent Supreme Court opinion in *South Dakota v. Bourland,* 508 U.S., 113 S. Ct. 2309 (1993), the Court remanded a portion of the case pertaining to jurisdiction over nonmember activities on fee lands to the District court for consideration under the *Montana* rule. The Agency

believes that the *Bourland* opinion is thus consistent with the Court's *Montana* and *Brendale* decisions and with the Agency's 1991 analysis. The Agency also believes that the exceptions to the *Montana* rule, allowing tribal jurisdiction where there is potential for direct impacts on tribal health and welfare, are appropriately applied in this case. In addition, it should be noted that the Agency operating rule asks Tribes to show that the impacts required by the *Montana* rule be more than *de minimis;* in fact, the Agency rule asks, and the Tribes have demonstrated, that these impacts be "serious and substantial."

The Tribes also contend that the CWA delegates authority for approved Tribes to regulate water quality for all sources within the exterior boundaries of the Reservation and that the CWA preempts the State from regulating water quality within the Reservation. The Tribes' position is based on language in the Act authorizing approval of a tribal program for functions "within the borders of an Indian reservation," 33 U.S.C. Section 1377(e)(2), and defining a Reservation as "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." 33 U.S.C. Section 1377(h)(1).

EPA regulations governing reservation water quality standards do not construe the CWA as delegating authority to Tribes over all reservation sources, or as preempting State regulation. 56 Fed. Reg. 64880. Nevertheless those regulations do explicitly request each Tribe "to outline all bases for concluding that the Tribe has adequate authority" to set water quality

standards on the reservation, noting that such a discussion "can only help EPA to make a proper determination" as to the appropriateness of approving the tribal water quality standards program. 56 Fed. Reg. 64881. The portion of the tribal submission discussing delegation and preemption complies with the Agency's explicit request in this regard, and is therefore appropriate for consideration. To the extent the Tribes' position is correct, it would provide support for EPA's determination.

Finding: EPA finds that existing and future activities on fee lands within the exterior borders of the Flathead Reservation having potential direct impacts on the health and welfare of the Tribes and tribal members that are serious and substantial. The facts upon which the Agency has based this finding are set forth in the Appendix.

In making its finding, the Agency has relied on its special expertise and practical experience regarding the importance of water management, recognizing that clean water, including critical habitat (i.e., wetlands, spawning beds, etc.) may be crucial to the survival of the Flathead Reservation.

Based upon its special expertise and practical experience, the Agency also believes that the activities regulated under the CWA generally have impacts on human health and welfare that are serious and substantial. As discussed at 56 Fed. Reg. 64878, this finding is consistent with our belief that the CWA itself constitutes, in effect, a legislative determination that activities which affect surface water quality and critical habitat quality may have impacts on

human health and welfare that are serious and substantial.

Additionally, the Agency is mindful that, because of the mobile nature of pollutants in surface waters and the relatively close proximity of stream segments and lake waters on fee and trust lands within the Flathead Reservation, it would be practically very difficult to separate out the effects of water quality impairment on fee lands within the Reservation from those on tribal portions. In other words, it is highly probable that any impairment occurring on, or resulting from activities on, fee lands will impair the water and critical habitat quality of the tribal lands. Similarly, the serious and substantial effects of water quality impairment within the non-member portions of the Reservation are very likely to affect the tribal interest in water quality.

EPA also believes that Congress has expressed a preference for tribal regulation of surface water quality to assure compliance with the goals of the CWA (*see* 56 Fed. Reg. at 64878-79). EPA interprets Section 518 of the CWA, in providing for the treatment of Indian Tribes as States under Section 303 of the Act, as authorizing Tribes to assume a primary role in setting water quality standards on reservations. A checkerboard system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities establish standards for closely intermixed stream segments. 56 Fed. Reg. 64878.

The generalized findings regarding the relationship of water quality to tribal health and welfare affect the legal analysis of the Tribes' submission by, in effect, supplementing the Agency's factual findings contained in the Appendix. In accordance with 56 Fed. Reg. at 64879, the Tribes have made a showing of facts that there are waters within the Reservation used by the Tribes or tribal members (and thus that the Tribes or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat of the Reservation are subject to protection under the CWA. The Tribes have also asserted that impairment of such waters by the activities of nonmembers would have an effect on the health and welfare of the Tribes that is serious and substantial. Based upon the facts available to the Agency from the Tribes and other sources, as presented in the Appendix, and in light of the generalized statutory and factual findings discussed above, the Agency believes that the Tribes have demonstrated that the protection of water quality sought to be carried out by setting water quality standards for water on fee lands on the Flathead Reservation would protect against potential impacts on tribal health and welfare that are serious and substantial.

Thus, the Agency believes that the Tribes have successfully demonstrated adequate authority to establish water quality standards within the Flathead Reservation and that the Tribes have met the requirements of 40 C.F.R. Section 131.8(a)(3).

D. **Capability:** The Confederated Salish and Kootenai Tribes have demonstrated that they are reasonably capable of establishing and implementing a water quality standards program that will comport with the requirements of the CWA. In determining that the Tribes have the capability to establish and implement an adequate water quality standards program, the Agency considered that the tribes:

1. Have developed and staffed a Natural Resources Department which has the legal authority to carry out the mission of the water quality standards program;
2. Having enacted the Water Quality Management Ordinance (89-B, Title I of the Tribal Water Code) to ensure that, "the quality of the water resources of the Flathead Reservation be protected, restored and maintained in conformance with the tribal Administrative Procedures Ordinance S6B, May 24, 1991; and
3. Have drafted interim water quality standards regulations that have been informally reviewed by EPA. These standards include the CWA basic requirements of identifying and designating beneficial uses for tribal waterbodies, identifying water quality criteria to protect those beneficial uses, and a policy on antidegradation.

Details are provided in Volume II of the Section 303 TAS application. Following a review of the materials in Volumes I and II of the Application for TAS, the Agency concluded that the Tribes had demonstrated capability. (Reference: Memo to

File from Bob Erickson, Application of the Confederated Salish and Kootenai Tribes of the Flathead Nation for Treatment as a State for purposes of the establishment and implementation of a water quality standards program.)

III. *Conclusions:* The Agency has determined that the Confederated Salish and Kootenai Tribes of the Flathead Reservation have met the requirements of 40 CFR Section 131.8 and are eligible to be treated as a state for purposes of Section 303(c) of the CWA.

/s/ William P. Yellowtail
William P. Yellowtail 2/27/95
Regional Administrator
EPA Region 8

Appendix

Factual Analysis of Finding: Existing and future activities on non-member owned fee lands within the exterior borders of the Flathead Reservation have potential direct impacts on the health and welfare of the Tribes and tribal members that are serious and substantial.

A. Basis for Finding

The following information is organized to develop and present evidence showing the relationship between activities originating on non-member owned fee lands (fee lands) and impairment of water quality and beneficial uses. The first four headings discuss:

1. How water quality and beneficial uses affect the health and welfare of the Tribe;
2. How tribal and fee lands are related to tribal waters;
3. The general kinds of water quality degradation which originate on fee lands and influence tribal waters; and
4. Specific examples of actions that originate on fee lands which have the potential to impair water quality and beneficial uses of tribal waters.

This is followed by a discussion of:

5. Tribal beneficial uses that may not be protected by State standards; and
6. State/tribal antidegradation differences that have potential impacts on welfare of the Tribes that are serious and substantial.

1. Relationship of water quality and beneficial uses to the health and welfare of the Tribes and tribal members.

The Federal Water Pollution Control Act (CWA) of 1972 and subsequent amendments call for the maintenance and restoration of the physical, chemical and biological integrity of our nation's waters. The quality of water above and within the stream or lake bed and the quality of the stream or lake beds themselves have a direct effect on this goal.

The integrity of our nation's waters is directly related to water quality standards that are intended to assure the full protection of all existing uses and designated uses identified by States and Tribes. Beneficial uses typically

include, but are not restricted to, domestic water supply, fish and aquatic life, recreation in and on the water, wildlife, agriculture, industrial and navigation uses. Water quality standards that provide full protection of beneficial uses affect tribal health and welfare in the following ways:

- The full protection of domestic water supplies ensures that human health will be directly protected from disease and from exposure to toxic materials at acute or chronic levels as a result of exposure through drinking water uses. This protection is basic to the health and welfare of tribal members;

- The full protection of fish and other aquatic life assures that aquatic ecosystems will function to cycle energy, to aid in the detoxification of contaminants and to provide the diversity and productivity of life within tribal waters. These functions, in turn, enable aesthetic, educational/scientific, recreational, and good goals of the Tribes to be achieved and directly affect the welfare of the Tribe. The full protection of the aquatic life use also helps ensure the economic well being of the Tribes and tribal members through harvest of fish and other aquatic life and encouragement of water-based recreation businesses;

- The full protection of recreation in and on the water affects tribal welfare by allowing tribal and non-tribal citizens the recreational use of waters for body contact during play and sport without undue threat of disease or loss of aesthetic pleasure. The economic well being of the Tribes and tribal members is enhanced through harvest of aquatic life and

encouragement of ecological and water-based recreation;

- The full protection of wildlife uses helps assure that birds, mammals, reptiles, and amphibians that use and depend upon tribal waters as a source of water, food, or habitat will maintain the species diversity and productivity that tribal lands and waters are capable of supporting. Protection of the wildlife use also protects the health of tribal members from toxins that can accumulate in wildlife and be passed to humans. In addition, protection of the wildlife use helps ensure the economic well being of the Tribes through providing ecological and water-based recreation;
- The full protection of agricultural uses helps assure the economic welfare of the Tribes through protection of crops and assures protection of the health of tribal members through control of contaminants that enter crops through irrigation from tribal waters;
- The full protection of industrial and navigation uses helps assure the economic welfare of the Tribes through control of contaminants that may be costly to industrial or navigation uses through corrosion or interference with industrial processes.

2. Relationship of tribal lands to fee lands and tribal waters.

The attached map shows the types of land ownership that exists within the Flathead Reservation. Tribal and Indian-owned fee lands are estimated to include 54-58%

of the area within the boundary, including Flathead Lake itself (personal communication, CSKT, Natural Resources Dept). The Tribes consider all waters within the exterior boundaries to be waters of the Flathead Reservation.

Tribal lands include most of the headwater streams and lakes on the western, eastern and southern borders of the Reservation. In addition, lands surrounding the Flathead River, lands to the east of Flathead Lake, and smaller parcels scattered between fee lands are tribal lands. The majority of the central valley area is in fee land.

The reservation is drained by five major watersheds and two lesser ones. The major watersheds are the Flathead, Jocko, and Little Bitterroot Rivers and Mission and Crow Creeks.

- The largest river, the Flathead River below Flathead Lake, is surrounded by tribal lands, but much of the drainage to the river is from fee lands. All of the other major systems drain into the Flathead River within the Reservation.

- The Jocko River drains most of the south-east portion of the Reservation. It is surrounded primarily by fee lands in the low-lying areas and enters the Flathead River near the National Bison Range.

- The Little Bitterroot River drains the largest land area within the Reservation, covering the north-west and central portion of the Reservation. Most of this river flows through fee lands and enters the Flathead River a few miles upstream of Crow Creek.

- Mission Creek drains the eastern portion of the Reservation, flows through the northern portion of the National Bison Range (federal land) and enters the Flathead River 2-3 miles upstream of the Jocko River confluence. Most of this drainage flows through fee lands.

- The Crow Creek basin lies just to the north of Post Creek and drains the central-eastern portion of the Reservation. Most of the drainage flows through fee lands and enters the Flathead River approximately in the center of the Reservation.

3. **Kinds of water quality degradation that originate on fee lands and have potential impacts on tribal health and welfare that are serious and substantial.**

Specific examples of water quality effects originating on fee lands are provided later in this Appendix. The following provides a basis for assessing the significance of these specific examples by describing the kinds of water quality impacts and their potential effects on beneficial uses. (EPA does not imply that these effects are only limited to actions originating on fee lands.) EPA believes that the kinds of water quality degradation that result from activities on fee lands can adversely affect beneficial uses and therefore have potential impacts on tribal health and welfare that are serious and substantial. Establishment of water quality standards for all waters on the reservation enables the Tribe to set appropriate water quality goals to aid in avoiding these potential impacts.

Degradation of water quality as a result of activities originating on fee lands are primarily related to the following kinds of effects.

- Increases in water turbidity and deposition of fine sediments on stream and lake bottoms result from agricultural practices on fee lands (CSKT, Water Management Program, field reports 1990-1993). Turbidity and fine sediments can negatively affect aquatic life in tribal waters by reducing photosynthesis of plant life, by interfering with sight feeding of fish, by smothering fish eggs and insect life, and by reducing the habitat available for food organisms and spawning of fish.

  The result of increased turbidity and sediment deposition can be a lower growth rate of fish from loss of food resources and/or elimination or significant reduction of spawning success in streams. Fish populations in both the streams and the lakes to which they are tributary may decline. This could be particularly important to the west-slope cutthroat trout (rare in Flathead Lake) which is dependent upon the habitat and water quality of tributary streams for spawning.

- As herbicides and pesticides are used on Reservation fee lands, increases in loadings of these substances can result from agricultural runoff from these lands (runoff may be a result of irrigation use of waters, precipitation or both). Depending on the concentrations, these loadings may cause direct mortality or reduction of growth and reproduction in fish and invertebrates. Tribal members may also face increased health risks

from exposure to herbicides and pesticides present in fish flesh or drinking water taken from tribal waterbodies or from ingestion of wildlife that feed upon aquatic plants or animals in tribal waterbodies. Although concentrations of herbicides and pesticides have not been measured from agricultural runoff within the reservation, elevated levels are well documented from agricultural areas around the nation.

- Diversion of flows for agricultural uses on fee lands and return flow from fee lands can result in secondary effects on water quality and the integrity of aquatic communities by increasing stream temperatures and by the loss of physical habitat for fish and other life. Increased stream temperatures may exceed levels necessary for optimum growth, cause direct mortality, or prevent successful spawning and survival of coldwater fish such as salmon and trout;

- Agricultural runoff from fee lands has been identified as a significant source of water quality degradation. Increases in loading of nutrients (primarily nitrogen and phosphorus compounds) can result from both irrigation and precipitation. These nutrients can stimulate undesirable increased growth of vegetation in lakes or streams. High concentrations of phytoplankton (microscopic plants) or larger plants are known to result in undesirable changes in water quality on a daily or seasonal basis. For example, excessive vegetation may result in very low levels of dissolved oxygen during dark hours when

photosynthesis does not occur but respiration continues. Stimulation of plant growth from excessive nutrients may result in low dissolved oxygen and fish kills during winter periods.

High nutrient levels also encourage a shift in the species of lake phytoplankton, encouraging the bluegreen algae typical of eutrophic (over-enriched) lakes. This may result in a less desirable food source for zooplankton, production of plant toxins, and seasonal low dissolved oxygen concentrations.

- Increases in loadings of ammonia, chlorine and oxygen-demanding substances (BOD) may result from improper operation or accident conditions at sewage treatment plants on fee lands which discharge into tribal waters. Because rather small shifts in pH and temperature can significantly increase the toxicity of ammonia, effects of discharges on the growth and survival of aquatic life may occur far downstream from discharges. Ammonia and its breakdown products may also serve as nutrients for excessive plant growth and as sources of oxygen demand, which can lower oxygen levels in tribal waters.

  Chlorine has direct toxicity to aquatic life at very low levels and may directly affect the growth, reproduction and survival of aquatic life.

  Increases in BOD loading can result in reduced oxygen levels, which affects aquatic life survival, growth, and productivity.

- Fecal contamination of tribal waters can result from improper operation or accident conditions at sewage treatment plants on fee lands that discharge into tribal waters. Fecal coliforms are indicators of health risks resulting from human waste, and diseases may pass to human populations that drink, bathe, or otherwise come in contact with tribal waters so contaminated.

4. Examples of actions originating on fee lands that have potential impacts on the water quality and beneficial uses of tribal waters that are serious and substantial.

EPA believes that actions on fee lands have potential impacts that are serious and substantial on the beneficial uses of fisheries and aquatic life, recreation, and drinking water supplies and on the physical, chemical and biological integrity of tribal waters. A similar conclusion was reached in the 1992 Assessment of Water Quality on the Flathead Reservation. The Report concluded that, "As streams flow onto valley floors, human impacts causing diminished water quality and aesthetic appeal are evident in almost every stream."

The following examples provide recent or ongoing illustrations of actions on fee lands that can affect the water quality and beneficial uses of tribal waters and have potential for direct impacts on the health and welfare of the Tribe that are serious and substantial. Examples include effects on streams, lakes and wetlands. These examples are illustrative and not comprehensive.

a) Flathead Lake

Flathead Lake is the major water body on the Flathead Reservation and encompasses approximately 126,000 acres within Reservation boundaries. South Bay, at the south end of the lake, is entirely within tribal boundaries, is semi-isolated and relatively shallow (and is therefore more susceptible to pollution). The City of Polson lies along the southern border of the bay.

Examples of actions originating on fee lands that have potential impacts that are serious and substantial on the water quality and beneficial uses of Flathead Lake include:

- Discharges from the Flathead Lake RV and Campground (east shore of Flathead Lake). This campground has been found to discharge without a permit, and the discharge has contained fecal coliform concentrations that exceed EPA criteria for the protection of human health. The facility was the subject of an EPA Administrative Order, Docket #8-93-01-PI, 10 May 1993, and operated during the summer of 1993 and 1994 without a discharge permit. As a result of this discharge originating on fee lands, the Tribes notified EPA of their concern about the safety of tribal members and other citizens that may swim or bathe in the vicinity of the lake discharge (letter to Paul Montgomery, US EPA, Helena, Mt., 27 July, 1993). This discharge resulted in a temporary loss of a recreational beneficial use in the area of the lake where the discharge occurs (memo to tribal Division of Lands and letter to Lake County from CSKT, Dept. of Natural Resources.

- On 5/26/90, gas and oil was discharged from a boat into Indian Bay, a shallow bay containing nesting waterfowl (CSKT, Shoreline Protection Office field report). Wildlife beneficial uses were potentially impaired by direct action of petroleum products on young and adult birds in the area.

- The Montana 305(b) Report (a biennial report assessing the status of state waters) notes that "Flathead Lake data have shown a decline in lake quality due to increased algal production since 1977". Nutrient loading of Flathead Lake is a significant concern in maintaining the ecology of the lake, and this decline in water quality has been and continues to be a significant concern to the Tribe, and has resulted in an EPA grant to study the nutrient loading and dynamics of the lake. Although presently the total loading of lake nutrients comes primarily from the upper basin through the upper Flathead River, the potential for fee lands to significantly influence nutrient loading in lower portions of the lake and South Bay exists because of the large proportion of these lands that surround the lake.

- At present, at least five storm drains flow into South Bay from the city of Polson. The City also has "overflow" from a pumping/lift station which has historically flowed into the river at Riverside Park. These drains are potential sources of nutrient loading as well as other contaminants such as metals, turbidity, oil and grease and fecal bacteria (Results of the Nationwide National Urban Runoff Program studies, USEPA, December,

1993). In addition, there are cattle lots within the city that contribute to the storm drain effluent. Eutrophication of the lower bay could affect valuable perch and lake trout fisheries and affect recreation and aesthetic values of tribal members through influence on the fisheries and presence of algal blooms (personal communication, CSKT, Dept of National Resources).

- Sedimentation and increased turbidity of tributary waters entering Flathead Lake have been documented by CSKT to originate on fee lands and have the potential to affect localized nearshore lake areas by reducing light penetration for photosynthesis and by smothering or providing unsuitable substrate from some invertebrate populations (personal communication, observations by CSKT, Dept of Natural Resources staff). These conditions, plus increased temperatures and loss of spawning habitat in tributary streams, have the potential to impair fish populations of the lake, particularly the rare native westslope cutthroat trout.

- Sites at the "Town Pump" and "Four Corners" service stations in the city of Polson are known sources of petroleum contamination that enter tribal waters at South Bay and near the outlet to the Flathead River below Flathead Lake. Contamination from the gas stations has added to contamination from previously contaminated fill materials at the sites, and concentrations of benzene, ethyl benzene, toluene and xylene have been documented (Shannon Environmental, Reports to City of Polson). Leakage from these sites is

believed to result in a discharge to the lake during periods of low lake level (personal communication, Salish-Kootenai Tribe, tribal Shoreline Protection Office.

b) Flathead River below Flathead Lake.

The Flathead River, from below the lake downstream to the tribal boundary, is surrounded by primarily tribal lands. However, most of the lands that drain directly to the river or through its major tributaries are fee lands. Major tributaries are the Jocko River from the south-east, Mission Creek from the east, Crow Creek from the central east, and the Little Bitterroot from the central west. Degraded water quality exists in some of these streams (CSKT, Water Quality Assessment Report, 1992), and impaired water quality effects on these tributaries have the potential to impair the Flathead River.

An example of effects on water quality in the river comes from the sewage treatment plant discharge from the City of Polson. On two occasions the effluent has exceeded its BOD permit limits (Discharge Monitoring Reports to the State of Montana, 9/30/92 and 6/30/93). BOD is a measure of the oxygen consuming capacity of the discharge and directly influences water quality by using up available oxygen within the river. Although biological effects on the river have not been directly investigated, lowered oxygen values can adversely affect fish and other aquatic life of the river and result in the significant potential for impairment of the aquatic life beneficial use.

In addition, there are three storm drains that discharge into the river from the city. Although specific effects of these drains have not been investigated, nationwide there is concern about the effects of storm runoff on the biological integrity of streams and lakes (Environmental Impacts of Stormwater Discharges, USEPA, June, 1992).

Other discharges known to have occurred that would affect the water quality of the Flathead River are (personal communication, CSKT Dept of Natural Resources):

- On 1/4/88, 3500 gallons of diesel fuel spilled in to the river; and
- On 1/20/89, a gas tank overflowed spilling approximately 20 gallons of gas into the river.

No studies were performed to document effects of these discharges, however, petrochemicals are known to cause chronic and acute effects on both aquatic life and wildlife. A significant potential for impairment of the aquatic life and wildlife uses exists.

c) Little Bitterroot River

The Little Bitterroot River system drains a substantial amount of irrigated land in the north-west quarter of the Reservation. Irrigation practices on fee lands result in periodic high concentrations of suspended solids and high salt concentrations (1992, CSKT, Water Quality Assessment Report). Impacts that result from these activities include stream gravels that are heavily imbedded in fine sediments and degraded riparian areas. These

impacts affect aquatic life by reducing or eliminating spawning and other life stage habitats and by increasing summer/fall temperatures in the stream to levels unsuitable for cold water species. An overall lowered productivity of the stream and impaired aquatic life beneficial use is likely to result.

d) Lower Crow Reservoir and Crow Creek

- Lower Crow Reservoir lies in the central portion of the Reservation, just to the east of the Flathead River. The upper drainage is entirely tribal wilderness. Much of the lands surrounding the reservoir are primarily fee lands, and approximately half the lands along the creek below the reservoir are fee lands.
- Nutrient loading and sediment loading of the reservoir is the most significant known impact on water quality (303 Water Monitoring Program, CSKT Natural Resources Dept). The reservoir periodically exhibits high turbidity which is likely to impair its value as aquatic habitat from some fish and invertebrate species.
- At times, poor quality waters from the reservoir drain to Crow Creek, which results in high suspended solids and salts and degraded fish habitat due to sediment deposition (visual observations by CSKT Dept of Natural Resources staff). In addition, the community of Ronan STP (5 miles south of Pablo) which discharges to Crow creek has exceeded the BOD limits in their discharge permit a number of times, which can lead to

lowered dissolved oxygen in the creek (Discharge Monitoring Reports to the State of Montana, 6/30/90, 3/3/91, 11/30/91 and 12/31/92).

- A camper-trailer discharge of "grey" water (kitchen/bath water) and "black" water (untreated sewage) to the creek has been reported (citizen report to CSKT, Dept of Natural Resources, July 6, 1994). In addition, reports have also been made of a slaughterhouse near Ronan discharging meat refuse into the creek (citizen reports in December, 1985, and June, 1994). Both of these instances originate on fee lands and have the significant potential to impair human health, aquatic life uses and aesthetic qualities, and contribute to a significant decline in dissolved oxygen in the creek.
- The CSKT Dept of Natural Resources believes that the combined effects of all of these activities have significantly contributed to the low fisheries productivity observed in the creek and resulted in the significant potential for impairment of aquatic life and recreation beneficial uses (personal communication with CSKT, Dept of Natural Resources staff, based on site investigation).

e) Tribal wetlands

The following examples illustrate how waters of two tribal wetlands have been negatively affected by actions on fee lands:

- Operations of non-tribal restaurant in the community of Charlo (north of the National

Bison Range) resulted in sewage surfacing and draining into a tribal wetland during the week of July 1, 1994 (site investigation, CSKT, Dept of Natural Resources). Because of the presence of untreated sewage and bacterial contamination of the wetland, human health, aquatic life and recreational beneficial uses of the wetland had the significant potential of being impaired.

- In the second case, sewage from a rented trailer on fee lands in the Community of Charlo was discharged into tribal wetlands during the week of July 1, 1994. CSKT staff (personal communication) believes this has been going on for some time. Again, because of the presence of untreated sewage and bacterial contamination human health and recreational and aquatic life beneficial uses of the wetland had the significant potential of being impaired.

f) Spring Creek

Spring Creek is a tributary of Post Creek near the community of Charlo. A community home without a septic system discharged into an irrigation ditch which flows into Spring Creek, and fecal coliform counts as high as 1,000 times EPA criteria have been monitored (personal communication, CSKT Dept of Natural Resources, site investigation). In addition to fecal coliforms, the discharge would result in increases in oxygen-demanding materials in the effluent, although this was not quantified. As a result of this discharge from fee lands, human

health, recreation, and aquatic life uses in the stream uses had the significant potential of being impaired.

g) Mission Creek

Mission Creek flows primarily through fee lands from Mission Reservoir to the Flathead River. The stream exhibits high suspended solids loading, high nutrient levels and degraded fish habitat, partially as the result of deposition of fine sediments in the stream bottom (CSKT Water Quality Assessment Report, 1992). CSKT, Dept of Natural Resources believes that fee lands are a significant contributor to these water quality and habitat impacts, which have resulted in a loss of aquatic productivity and resulted in the significant potential for impairment of the beneficial uses of aquatic life and recreation (personal communication).

h) Sabine Creek

Sabine Creek is a tributary of Mission Creek flowing near the community of St. Ignatius. The St. Ignatius sewage treatment plant has been discharging effluent to the creek and the effluent has contained a biological oxygen demand (BOD) in excess of permit limits (Discharge Monitoring Reports to the State of Montana, 4/30/90, 5/31/90, 4/30/91/, 5/31/91). The potential result of this excess BOD is a lowered dissolved oxygen in Sabine and Mission creeks which can reduce aquatic productivity and/or result in the death of aquatic life. As a result, aquatic life and recreational beneficial uses had the significant potential of being impaired.

i) Hot Spring Creek

Hot Spring Creek is a tributary of the Little Bitterr oot [sic] River, originating in the far central-western portion of the Reservation. The community of Hot Springs discharges effluent to Hot Spring Creek from their sewage treatment plant and have exceeded the BOD limits of their permit in recent years (Discharge Monitoring Reports to the State of Montana, 8/31/90, 3/31/92, 4/30/94, 5/31/94). The BOD contributes to a lowering of the dissolved oxygen in the stream and can reduce the aquatic productivity and/or result in the death of aquatic life. As a result of these excessive discharges from fee lands, the aquatic life and recreational beneficial uses of tribal waters had a significant potential for being impaired.

5. Beneficial uses that may not be protected.

The CWA allows States and Tribes to set water quality standards to protect any beneficial uses they deem appropriate. Water quality standards that protect religious and cultural beneficial uses may also be adopted by the Tribes and are presently not recognized as existing or designated uses by the State of Montana standards. These unique, beneficial uses of tribal waters may not be protected without tribal authority to set water quality standards. Because of the lack of State standards to protect such uses, activities originating from fee lands have potential impacts that are serious and substantial on the welfare of the Tribes and tribal members who use tribal waters for religious and cultural purposes.

6. Degradation of tribal waters.

EPA water quality standards regulations at 40 CFR 131 require Tribes and States to have antidegradation policies and implementing procedures to protect waters that have a quality better than necessary to support aquatic life, wildlife and recreation uses. State and tribal antidegradation programs must also include provisions for the designation and protection of Outstanding National Resource Waters (ONRW's) and must prohibit the loss or impairment of any existing uses. Because EPA policy allows for a range of discretion in the formulation and implementation of these policies, the Tribes may wish to have more stringent protection of its high quality waters than current Montana State policy requires.

Degradation of tribal waters has the potential for affecting the welfare of the Tribes through influence on economic growth and tourism. In its brochure, "Flathead Reservation" (undated), the Tribes describe their natural resources, saying that,

> "A variety and abundance of natural resources make the Flathead Reservation one of the most attractive places in the United States. Its land, water, forest, recreational and scenic resources draw people here to live, work and play." Further, "The Confederated Salish and Kootenai Tribes are very much aware of the importance of protecting these resources."

The ability to establish and implement guidelines to designate and protect ONRWs is an essential governmental option provided by the CWA. In carrying out a tribal program to designate and protect ONRWs, tribal

control over the stream designations and degrading activities on fee lands can be crucial to avoiding effects that are serious and substantial on the water quality of ONRW waterbodies and thus on the welfare of the Tribes and tribal members.

B. Finding

EPA finds that existing and future activities on fee lands within the exterior borders of the Flathead Reservation have potential direct impacts on the health and welfare of the Tribes and tribal members that are serious and substantial. The establishment of water quality standards by the Tribes will enable the Tribes to set appropriate water quality goals to aid in avoiding these potential impacts.

56 Fed. Reg. 64876 (December 12, 1991)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[WH-FRL-4038-8]

Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This rule amends the water quality standards regulation by adding: (1) The procedures by which an Indian Tribe may qualify for treatment as a State for purposes of the Clean Water Act section 303 water quality standards and section 401 certification programs, and (2) a mechanism to resolve unreasonable consequences that may arise from Indian Tribes and States adopting differing water quality standards on common bodies of water.

EFFECTIVE DATE: The rule shall be effective January 13, 1992.

ADDRESSES: The public may inspect the administrative record for this rulemaking and all comments received on the proposed regulation at the Environmental Protection Agency, Standards and Applied Science Division, Office of Science and Technology, room 919 East Tower, 401 M

Street, SW., Washington, DC, between the hours of 8 a.m. and 4:30 p.m. on business days. A reasonable fee will be charged for copying. Inquiries can be made by calling 202-260-1315.

FOR FURTHER INFORMATION CONTACT: David K. Sabock, Environmental Protection Agency, Standards and Applied Science Division, (WH-585), 401 M Street, SW., Washington, DC, 20460, (202) 260-1318.

SUPPLEMENTARY INFORMATION: Information in this preamble is organized as follows:

A. Background
B. Changes to the Proposed Rule
C. Response to Public Comments
1. Treatment of Tribes as States
2. Dispute Resolution Mechanism
3. Establishing Water Quality Standards on Reservations
4. Other Comments
D. Regulatory Flexibility Act
E. Paperwork Reduction Act
F. Regulatory Impact Analysis

A. Background

Section 303(c) of the Clean Water Act (33 U.S.C. 1313(c)) requires the States to develop, review, and revise water quality standards for all surface waters of the United States. The Environmental Protection Agency's (EPA's) implementing regulations (40 CFR part 131) require that, at a minimum, such standards include designated water uses, in-stream criteria to protect such uses, and an antidegradation policy. EPA's role in the water

quality standards program is to review and approve or disapprove the State-adopted water quality standards and, where necessary, to promulgate Federal water quality standards.

Section 401 of the CWA provides that States may grant or deny "certification" for Federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the State's determination regarding whether the proposed activity will comply with the requirements of certain sections of the CWA enumerated in section 401(a)(1). These sections include those requiring water quality standards and effluent limitations. If a State denies certification, the Federal permitting or licensing agency is prohibited from issuing a permit or license. Certifications are subject to objection from downstream States where the downstream State determines that the proposed activity would violate its water quality requirements. Certifications are normally issued by the State in which the discharge originates, but may be issued in certain circumstances by an interstate agency or the Administrator.

The February 4, 1987 Amendments to the Act added a new section 518, which requires EPA to promulgate regulations specifying how the Agency will treat qualified Indian Tribes as States for the purposes of, among others, the section 303 (water quality standards) and section 401 (certification) programs described above. Section 518 also requires EPA, in promulgating these regulations, to establish a mechanism to resolve unreasonable consequences that may result from an Indian Tribe and a State

adopting differing water quality standards on common bodies of water.

On September 22, 1989, the Environmental Protection Agency (EPA) proposed amendments to the water quality standards regulations in response to CWA section 518 requirements (*see* 54 FR 39098). The proposal included amendments that would: (1) Add procedures by which an Indian Tribe could qualify for treatment as a State for purposes of the section 303 water quality standards and section 401 certification programs of the Clean Water Act, and (2) establish a mechanism to resolve unreasonable consequences that may result from an Indian Tribe and a State adopting differing water quality standards on common bodies of water. Pursuant to CWA section 518, the proposal had been prepared in consultation with States and Indian Tribes. The proposal was developed with the assistance of an informal work group composed of representatives from Indian Tribes, States, and EPA. In addition, a national consultation meeting involving States and Tribes was held in Denver, Colorado in June of 1988 for the purpose of obtaining additional comments. Finally, EPA distributed a number of drafts of the proposal to all States and Tribes (following a mailing list of Federally recognized Tribes obtained by the Office of Water) for review and comment prior to issuing the proposed rule.

Public hearings on the September 22, 1989 proposal were held in Phoenix, Arizona on November 14, 1989, Rapid City, South Dakota on November 16, 1989, and Washington, DC on December 5, 1989. A total of 25 people registered at the three hearings. The public comment period closed on December 22, 1989. EPA received a total of 34 written comments on the proposed rule.

EPA notes that more comments were received on the various drafts of the proposed rule than on the proposed rule which was ultimately published. EPA believes that many of the difficult issues were resolved during the consultation period prior to proposal, and that this explains why relatively few comments were received on the proposal and why relatively few changes to the proposal were required in preparing today's final rule. Another reason is that EPA had previously published similar procedures under CWA section 518 for the section 106 water quality management and planning program (54 FR 14354; April 11, 1989).

Additional background information was included in the preamble to the proposed rulemaking.

* * *

C. Response to Public Comments

The response to public comments is organized into four sections: (1) Treatment of Tribes as States, (2) dispute resolution mechanism, (3) establishing water quality standards on Indian reservations, and (4) other comments. Comments discussed within each of these sections have been further categorized by topic.

1. Treatment of Tribes as States

Comments on the Authority Requirements

a. The Scope of Inherent Tribal Authority

Comment: The issue of whether and how EPA should require Tribes to demonstrate that they meet the requirements of section 518(e)(2) of the CWA, i.e., that they can

demonstrate authority to regulate water quality within the boundaries of their reservations, attracted significant comment. Numerous commenters remarked on the significance of the Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989) for EPA's programs and today's regulations, although there were widely differing views of how to read the decision. Several commenters asserted that *Brendale* clearly indicates that an Indian Tribe may not enforce its water quality standards against non-members of the Tribe on non-Indian-owned fee lands within the boundaries of the reservation or that, at the very least, the Tribe must include detailed factual information that describes the non-Indian lands the Tribe proposes to regulate and the reasons supporting its jurisdictional assertions.

By contrast, other commenters asserted that Tribes invariably possess inherent authority to regulate all reservation waters, and that EPA should presume the existence of such authority and not require Tribes to make any specific factual showing. These commenters asserted that such authority over environmental matters was recognized in *Montana v. United States*, 450 U.S. 544 (1981), and not diminished by *Brendale*.

Response: EPA does not read the holding in *Brendale* as preventing EPA from recognizing Tribes as States for purposes of regulating water quality on fee lands within the reservation, even if section 518 is not an express delegation of authority (an issue discussed in detail below). In *Brendale*, both the State of Washington and the Yakima Nation asserted authority to zone non-Indian real estate developments on two parcels within the Yakima reservation, one in an area that was primarily Tribal, the

other in an area where much of the land was owned in fee by nonmembers. Although the Court analyzed the issues and the appropriate interpretation of *Montana* at considerable length, the nine members split 4:2:3 in reaching the decision that the Tribe should have exclusive zoning authority over property in the Tribal area and the State should have exclusive zoning authority over non-Indian owned property in the fee area. The decision reflects some difficult issues in this area of the law and, as the comments indicated, has generated considerable controversy over the extent of Tribal authority.

Given the lack of a majority rationale, the primary significance of *Brendale* is in its result, which was fully consistent with *Montana v. United States,* which previously had held that:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate * * * the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements * * * . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66 (citations omitted).

In *Brendale*, the Court applied this test, finding Tribal authority over activities that would threaten the health and welfare of the Tribe, 492 U.S. at 443-444 (Stevens, J.,

writing for the Court); *id.* at 449-450 (Blackmun, J. concurring). Conversely, the Court found no Tribal jurisdiction where the proposed activities "would not threaten the Tribe's * * * health or welfare." *Id.* at 432 (White, J., writing for the Court). The Agency therefore disagrees with commenters who argue that *Brendale* somehow overrules *Montana.*

As further discussed below, EPA agrees with certain commenters that pending further judicial or Congressional guidance on the extent to which section 518 delegates additional authority to Tribes, the ultimate decision regarding Tribal authority must be made on a Tribe-by-Tribe basis and has finalized the proposed process for making those determinations. Thus, EPA rejects the suggestion of other commenters that EPA make a conclusive statement regarding the extent of Tribal jurisdiction over fee lands for all Tribes and all waters or even a statement regarding any particular reservation, except in the context of an actual treatment as a State application. This is consistent with the approach the Agency adopted under the Safe Drinking Water Act, when it determined that it would not "automatically assume," or adopt, in the first instance, a rebuttable presumption of tribal authority over all water within a reservation that would operate even in the absence of any factual evidence. *See* 53 FR 37396, 37399 (September 26, 1988). Nonetheless, EPA sees no reason in light of *Brendale* to assume that Tribes would be per se unable to demonstrate authority over water quality management on fee lands within reservation borders. Rather, as discussed below, EPA believes that as a general matter there are substantial legal and factual reasons to assume that Tribes ordinarily have the legal

authority to regulate surface water quality within a reservation.

In evaluating whether a tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation, EPA will examine the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale*. The extent of such tribal authority depends on the effect of that activity on the tribe. As discussed above, in the absence of a contrary statutory policy, a tribe may regulate the activities of non-Indians on fee lands within its reservation when those activities threaten or have a direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 565-66. However, in *Brendale* several justices argued that for a tribe to have "a protectable interest" in an activity, the activity's effect should be "demonstrably serious." *Brendale*, 1492 U.S. at 431 (White, J.). In addition, in a more recent case involving tribal criminal jurisdiction, a majority of the Court indicated in dicta that a tribe may exercise civil authority "where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination." *Duro v. Reina*, 110 S.Ct. 2053, 2061 (1990). *See also Brendale*, 492 U.S. at 450 (Blackmun, J.) (test for inherent tribal authority whether activities "implicate a significant tribal interest"); *id.* at 462 (Blackmun, J.) (test for inherent tribal authority whether exercise of authority "fundamental to the political and economic security of the tribe").

As discussed above, the Supreme Court, in recent cases, has explored several options to assure that the impacts upon tribes of the activities of non-Indians on fee land, under the *Montana* test, are more than de minimis,

although to date the Court has not agreed, in a case on point, on any one reformulation of the test. In response to this uncertainty, the Agency will apply, as an interim operating rule, a formulation of the standard that will require a showing that the potential impacts of regulated activities on the tribe are serious and substantial.

The choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard per se. Moreover, as discussed below, the Agency believes that the activities regulated under the various environmental statutes generally have serious and subtantial impacts on human health and welfare. As a result, the Agency believes that tribes will usually be able to meet the Agency's operating rule, and that use of such a rule by the Agency should not create an improper burden of proof on tribes or create the administratively undesirable result of checkerboarding reservations.

Whether a tribe has jurisdiction over activities by nonmembers will be determined case-by-case, based on factual findings. The determination as to whether the required effect is present in a particular case depends on the circumstances.

Nonetheless, the Agency may also take into account the provisions of environmental statutes, and any legislative findings that the effects of the activity are serious in making a generalized finding that Tribes are likely to possess sufficient inherent authority to control reservation environmental quality. *See, e.g., Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 476-77 and notes

6, 7 (1987). As a result, in making the required factual findings as to the impact of a water-related activity on a particular tribe, it may not be necessary to develop an extensive and detailed record in each case. The Agency may also rely on its special expertise and practical experience regarding the importance of water management, recognizing that clean water, including critical habitat (i.e., wetlands, bottom sediments, spawning beds, etc.), is absolutely crucial to the survival of many Indian reservations.

The Agency believes that Congressional enactment of the Clean Water Act establishes a strong federal interest in effective management of water quality. Indeed, the primary objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (section 101(a)) and, to achieve that objective, the Act establishes the goal of eliminating all discharges of pollutants into the navigable waters of the U.S. and attaining a level of water quality which is fishable and swimmable (section 101(a)(1)-(2)). Thus the statute itself constitutes, in effect, a legislative determination that activities which affect surface water and critical habitat quality may have serious and substantial impacts.

EPA also notes that, because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are very likely to impair the water and critical habitat quality

of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality. EPA believes that a "checkerboard" system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments.

EPA also believes that Congress has expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA. This is confirmed by the text and legislative history of section 518 itself. The CWA establishes a policy of "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" section 101(b). By extension, the treatment of Indian Tribes as States means that Tribes are to be primarily responsible for the protection of reservation water resources. As Senator Burdick, floor manager of the 1987 CWA Amendments, explained, the purpose of section 518 was to "provide clean water for the people of this Nation." 133 Cong. Rec. § 1018 (daily ed. Jan 21, 1987). This goal was to be accomplished, he asserted, by giving "tribes * * * the primary authority to set water quality standards to assure fishable and swimmable water and to satisfy all beneficial uses." *Id.*

In light of the Agency's statutory responsibility for implementing the environmental statutes, its interpretations of the intent of Congress in allowing for tribal management of water quality within the reservation are entitled to substantial deference. *Washington Dept. of Ecology v. EPA*, 752 F. 2d 1465, 1469 (9th Cir. 1985); *see generally Chevron, USA v. NRDC*, 467 U.S. 837, 843-45 (1984).

The Agency also believes that the effects on tribal health and welfare necessary to support Tribal regulation of non-Indian activities on the reservation may be easier to establish in the context of water quality management than with regard to zoning, which was at issue in *Brendale*. There is a significant distinction between land use planning and water quality management. The Supreme Court has explicitly recognized such a distinction: "Land use planning in essence chooses particular uses for the land; environmental regulation * * * does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 587 (1987). The Court has relied on this distinction to support a finding that states retain authority to carry out environmental regulation even in cases where their ability to carry out general land use regulation is preempted by federal law. *Id.* at 587-89.

Further, water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government. The special status of governmental

actions to protect public health and safety is well established.[1] By contrast, the power to zone can be exercised to achieve purposes which have little or no direct nexus to public health and safety. *See e.g. Brendale*, 492 U.S. at 420 n.5 (White, J.) (listing broad range of consequences of state zoning decision). Moreover, water pollution is by nature highly mobile, freely migrating from one local jurisdiction to another, sometimes over large distances. By contrast, zoning regulates the uses of particular properties with impacts that are much more likely to be contained within a given local jurisdiction.

Operationally, EPA's generalized findings regarding the relationship of water quality to tribal health and welfare will affect the legal analysis of a tribal submission by, in effect, supplementing the factual showing a tribe makes in applying for treatment as a State. Thus, a tribal submission meeting the requirements of s 131.8 of this regulation will need to make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe. Once the Tribe meets

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[1] This special status has been reaffirmed by all nine justices in the context of Fifth Amendment takings law. *See Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 491 n. 20 (1987); *Id.* at 512, (Rehnquist, C.J., dissenting).

this initial burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, presume that there has been an adequate showing of tribal jurisdiction of fee lands, unless an appropriate governmental entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.

The Agency recognizes that jurisdictional disputes between tribes and states can be complex and difficult and that it will, in some circumstances, be forced to address such disputes. However, EPA's ultimate responsibility is protection of the environment. In view of the mobility of environmental problems, and the interdependence of various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection, rather than engage in confrontations over jurisdiction.

b. The Effect of Section 518 on Tribal Authority over Non-Indian Activities

Comment: EPA has received letters from three members of Congress, Senator Simpson, Senator Baucus, and Representative Morrison, regarding the impact of *Brendale* on EPA's Indian Policy and the development of "treatment as a State" regulations for EPA water programs in light of the legislative history of section 518. All three commenters asserted that Congress did not intend to expand the scope of Tribal authority over non-Indians on the reservation by the passage of section 518.

Rep. Morrison asserted that he inserted into the Congressional Record a memorandum written by staff on the House Committee on Interior and Insular Affairs regarding section 518 (also inserted into the Congressional Record by Senator Adams at 133 Cong. Rec. § 753-54 (daily ed. January 14, 1987)) solely to demonstrate that section 518 was not intended to expand Tribal water quantity rights. 133 Cong. Rec. H184-85 (daily ed. Jan 8, 1987). Rep. Morrison disavowed other statements from that memorandum which might support the proposition that Congress intended to authorize Tribal jurisdiction over non-members on reservations. ("Indian tribes have the right to regulate lands and other natural resources within the reservation, including non-Indian owned fee lands or resources." *Id.* (emphasis added)). Rep. Morrison stated his belief that Congress did not, by the passage of section 518, expand the scope of Tribal authority over non-Indians. In light of this legislative history, Rep. Morrison asserted that, consistent with *Brendale*, EPA should not allow Tribal regulation of non-members on so-called "open" reservations.

Senators Baucus and Simpson also recommended that EPA consider the legislative history of section 518(e) and the *Brendale* decision and determine not to allow Tribal regulation over non-members on the reservation.

Finally, all three of these Congressional commenters asserted that the legislative history of section 518 clearly shows that it was not intended to affect rights to water quantity under State law. The concerns raised by these Members of Congress echo other comments discussed elsewhere in today's notice. Several commenters asserted that section 518(e)(2) should not be read as an express

grant of Congressional authority to Indian Tribes to regulate such fee lands, despite indications in *Brendale* to the contrary.

By contrast, Senators McCain, Burdick, and Inouye expressed a view that section 518(e) delegates Tribes authority to regulate all waters within reservation boundaries including those on non-Indian fee lands. Some commenters cited *Brendale* for this proposition. The latter argument of these commenters is based upon the opinion of Justice White in *Brendale*. Justice White indicates that certain statutes may delegate Federal authority to Tribes, thereby providing a basis for authority over all lands within a reservation. As Justice White explained, on the record in *Brendale* there could be

> no contention * * * that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe. Compare 18 U.S.C. 1151, 1161 (1982 ed., and Supp. V); 33 U.S.C. 1377 (e) and (h)(1) (1982 ed., Supp. V) [i.e., sections 518(e) and 518(h)(1) of the CWA].

492 U.S. at 428 (1989) (White, J.) (emphasis added). This language clearly categorizes the two cited statutory schemes as express delegations of Federal authority. Thus, Justice White, inter alia, cites the Clean Water Act as an example of an explicit delegation of authority over non-Indian activities to Indian Tribes. *Response:* EPA has fully considered the Congressional comments and their interpretation of the legislative history of section 518. EPA must, of course, consider contemporaneous legislative history as it is written, and has been cautioned not to rely on subsequent statements by Members of Congress.

Hazardous Waste Treatment Council v. EPA, 886 F.2d 355 (DC Cir. 1989), *cert. denied*, 111 S.Ct. 139 (1990).

EPA differs with the Congressional commenters to the extent that they suggest the legislative history of section 518 is clear and expresses an intent to limit the scope of Tribal authority. EPA notes that other legislative history might be interpreted as evincing Congressional intent to confer expanded Tribal authority over non-Indians within the reservation.

In particular, the following colloquy between Senators Inouye and Burdick on this issue is very relevant:

> Mr. Inouye: * * * I am concerned about section 518(e)(2). As I read that provision, it enables qualified Indian tribes to exercise the same water quality regulatory jurisdiction with respect to water that traverses, borders, or is otherwise located within their reservations [paraphrasing section 518(h)(1) and 18 U.S.C. 1151(a)] that States have for regulation of water outside Indian reservations. Is my understanding of Section 518(e) correct?
>
> Mr. Burdick: Yes. The intent of the conferees was to assure that Indian tribes would be able to exercise the same regulatory jurisdiction over water quality matters with regard to waters within Indian jurisdiction that States have been exercising over their water.

133 Cong. Rec. § 1018 (daily ed. Jan. 21, 1987) (emphasis added). Senator Inouye's statement could arguably support a reading that Congress intended to recognize Tribal authority over all waters within the reservation, including those managed by non-Indians. Mr.

Burdick, a member of the Conference Committee, agrees with Senator Inouye's statement.

However, in EPA's view this colloquy is ambiguous and inconclusive. Senator Burdick, in responding to Senator Inouye, agrees that under section 518 Tribes may regulate waters only if they are already "within Indian jurisdiction." However, Senator Burdick was only recognizing the status quo, i.e., whatever is within Indian jurisdiction may be regulated via section 518. Senator Burdick's statement does not clearly show that he – or the Congress as a whole – intended to legislate that all waters within the reservation are in fact "within Indian jurisdiction." Thus, the colloquy is circular: Indians have jurisdiction if, but only if, they have jurisdiction from some source other than section 518. It does not clearly indicate whether Congress intended to expand what lies "within Indian jurisdiction."

Further, if this colloquy were to be construed as supporting an expansion of tribal authority, it would arguably conflict with a statement Senator Burdick had made earlier in response to an inquiry from Senator Baucus. In that discussion, Senator Burdick reiterated that section 518 was not intended to affect existing water quantity rights, and added that "[p]rivate lands and water rights owners within boundaries of Indian reservations are not to be additionally affected by this act." 133 Cong. Rec. § 753 (daily ed. January 14, 1987) (emphasis added). This could suggest that the Act was not intended to alter the status quo regarding regulatory authority over fee lands.

The legislative history in the House is also unclear as to whether Congress intended to expand tribal power over non-Indians. The statement in the House staff memorandum cited above supports a view that under current case law Tribes already possess regulatory authority over non-Indians within reservation boundaries; thus it would be unnecessary to delegate such authority to tribes. Insertion of this memorandum into the Congressional Record could suggest that the House agreed with that view; however, this aspect of the memorandum was never the subject of House discussions, which focused almost exclusively on issues relating to water rights.

EPA believes that if Congress had intended to make a change as important as an expansion of Indian authority to regulate nonmembers, it probably would have done so through statutory language and discussed the change in the committee reports. Given that the legislative history ultimately is ambiguous and inconclusive, EPA believes that it should not find that the statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe absent an express indication of Congressional intent to do so. *See Montana*, 450 U.S. at 564. Therefore, EPA has decided that it will, as discussed above, continue to recognize inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law, in light of *Montana, Brendale*, and other applicable case law.

EPA believes that Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law. EPA believes that this approach will best effectuate the overall purposes of the statute.

EPA agrees with those commenters who stated that Justice White's opinion in *Brendale* can be read to suggest a contrary conclusion, and to indicate that at least four justices of the Supreme Court would apparently interpret section 518(e) as expressly delegating to Tribes the authority to regulate water quality on reservations, including those affected by activities on non-Indian fee lands. Nonetheless, EPA recognizes that Justice White's opinion was not a majority opinion of the Court and was not necessary to the decision even of the plurality that joined it, since the issue was not before the Court in *Brendale*. Nor is there any discussion in the opinion about the somewhat confusing legislative history of section 518. The passing reference in that opinion does not finally resolve the question of whether section 518(e) is a delegation of authority, and, as discussed above, EPA does not believe that it can make an absolute determination that Congress in fact expressed a clear intent on the issue.

EPA agrees with the Congressional commenters that section 518 does not affect existing water quantity rights. This has been the Agency's consistent position, based on the language of sections 101(g) and 518(a).

* * *

[FR Doc. 91-29490 Filed 12-11-91; 8:45 am]

40 CFR § 131.8

CODE OF FEDERAL REGULATIONS
TITLE 40 – PROTECTION OF ENVIRONMENT
CHAPTER I – ENVIRONMENTAL PROTECTION AGENCY
SUBCHAPTER D – WATER PROGRAMS
PART 131 – WATER QUALITY STANDARDS
SUBPART A – GENERAL PROVISIONS

§ 131.8 Requirements for Indian Tribes to administer a water quality standards program.

(a) The Regional Administrator, as determined based on OMB Circular A-105, may accept and approve a tribal application for purposes of administering a water quality standards program if the Tribe meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in § 131.3 (k) and (l),

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers,

(3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

(b) Requests by Indian Tribes for administration of a water quality standards program should be submitted to the lead EPA Regional Administrator. The application shall include the following information:

(1) A statement that the Tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of the Tribal government;

(ii) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

(iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Indian Tribe's authority to regulate water quality. The statement should include:

(i) A map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality;

(ii) A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and

(iii) An identification of the surface waters for which the Tribe proposes to establish water quality standards.

(4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality standards program. The narrative statement should include:

(i) A description of the Indian Tribe's previous management experience which may include, the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards;

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a Tribal application.

(6) Where the Tribe has previously qualified for eligibility or treatment as a State under a Clean Water Act or Safe Drinking Water Act program, the Tribe need only provide the required information which has not been submitted in a previous application.

(c) Procedure for processing an Indian Tribe's application.

(1) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to § 131.8(b) in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

(2) Within 30 days after receipt of the Indian Tribe's application, the Regional Administrator shall provide appropriate notice. Notice shall:

(i) Include information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters; and

(ii) Be provided to all appropriate governmental entities.

(3) The Regional Administrator shall provide 30 days for comments to be submitted on the Tribal application. Comments shall be limited to the Tribe's assertion of authority.

(4) If a Tribe's asserted authority is subject to a competing or conflicting claim, the Regional Administrator, after due consideration, and in consideration of other comments received, shall determine whether the Tribe has adequately demonstrated that it meets the requirements of § 131.8(a)(3).

(5) Where the Regional Administrator determines that a Tribe meets the requirements of this section, he shall promptly provide written notification to the Indian Tribe that the Tribe is authorized to administer the Water Quality Standards program.

[56 FR 64895, Dec. 12, 1991; 59 FR 64344, Dec. 14, 1994]

33 U.S.C. § 1313

UNITED STATES CODE
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26 – WATER POLLUTION PREVENTION AND CONTROL
SUBCHAPTER III – STANDARDS AND ENFORCEMENT

§ 1313. Water quality standards and implementation plans

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any state and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the

date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if –

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standard; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but

at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing app'icable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State

reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such state shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved –

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be

consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load,

for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such

identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations

(A) Standard not attained

For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard,

or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained

For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not late than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not late than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter

for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required

to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in section 1311(b)(1) and 1311(b)(2) of this title nor to preclude an State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.

33 U.S.C. § 1370

UNITED STATES CODE
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26 – WATER POLLUTION PREVENTION AND CONTROL
SUBCHAPTER V – GENERAL PROVISIONS

§ 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1377

UNITED STATES CODE
TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 26 – WATER POLLUTION PREVENTION AND CONTROL
SUBCHAPTER V – GENERAL PROVISIONS

§ 1377. Indian tribes

(a) Policy

Nothing in this section shall be construed to affect the application of section 1251(g) of this title, and all of the provisions of this section shall be carried out in accordance with the provisions of such section 1251(g) of this title. Indian tribes shall be treated as States for purposes of such section 1251(g) of this title.

(b) Assessment of sewage treatment needs; report

The Administrator, in cooperation with the Director of the Indian Health Service, shall assess the need for sewage treatment works to serve Indian tribes, the degree to which such needs will be met through funds allotted to States under section 1285 of this title and priority lists under section 1296 of this title, and any obstacles which prevent such needs from being met. Not later than one year after February 4, 1987, the Administrator shall submit a report to Congress on the assessment under this subsection, along with recommendations specifying (1) how the Administrator intends to provide assistance to

Indian tribes to develop waste treatment management plans and to construct treatment works under this chapter, and (2) methods by which the participation in and administration of programs under this chapter by Indian tribes can be maximized.

(c) Reservation of funds

The Administrator shall reserve each fiscal year beginning after September 30, 1986, before allotments to the States under section 1285(e) of this title, one-half of one percent of the sums appropriated under section 1287 of this title. Sums reserved under this subsection shall be available only for grants for the development of waste treatment management plans and for the construction of sewage treatment works to serve Indian tribes, as defined in subsection (h) of this section and former Indian reservations in Oklahoma (as determined by the Secretary of the Interior) and Alaska Native Villages as defined in Public Law 92-203 [43 U.S.C.A. § 1601 et seq.].

(d) Cooperative agreements

In order to ensure the consistent implementation of the requirements of this chapter, an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this chapter.

(e) Treatment as States

The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title to the degree necessary to carry out the objectives of this section, but only if –

(1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and

(3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

Such treatment as a State may include the direct provision of funds reserved under subsection (c) of this section to the governing bodies of Indian tribes, and the determination of priorities by Indian tribes, where not determined by the Administrator in cooperation with the Director of the Indian Health Service. The Administrator, in cooperation with the Director of the Indian Health Service, is authorized to make grants under subchapter II of this chapter in an amount not to exceed 100 percent of

the cost of a project. Not later than 18 months after February 4, 1987, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

(f) Grants for nonpoint source programs

The Administrator shall make grants to an Indian tribe under section 1329 of this title as though such tribe was a State. Not more than one-third of one percent of the amount appropriated for any fiscal year under section 1329 of this title may be used to make grants under this subsection. In addition to the requirements of section 1329 of this title, an Indian tribe shall be required to meet the requirements of paragraphs (1), (2), and (3) of subsection (d) of this section in order to receive such a grant.

(g) Alaska Native organizations

No provision of this chapter shall be construed to –

(1) grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska;

(2) create or validate any assertion by such organization or any form of governmental authority over lands or persons in Alaska; or

(3) in any way affect any assertion that Indian country, as defined in section 1151 of Title 18, exists or does not exist in Alaska.

(h) Definitions

For purposes of this section, the term –

(1) "Federal Indian reservation" means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; and

(2) "Indian tribe" means any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

US ENVIRONMENTAL PROTECTION AGENCY (EPA)
TREATMENT OF TRIBES IN THE SAME MANNER AS STATES/PROGRAM APPROVAL MATRIX

As of March 1998

Total Tribes with TAS/PA - 146 [August 1996 Status: 103]
Total TAS/PA Determinations - 211 [August 1996 Status: 172]
Pending TAS/PA Determinations - 48 [August 1996 Status: 37]

GLOSSARY

TAS - Treatment in the Same Manner as a State
PA - Program Approval, When TAS Does Not apply
106 - Clean Water Act Section 106 Water Quality Management Grants Program
314 - Clean Water Act Section 314 Clean Lakes Grant Program
319 - Clean Water Act Section 319 Nonpoint Source Grant Program
303 - Clean Water Act Section 303 Water Quality Standards Program
402 - Clean Water Act Section 402 National Pollution Discharge Elimination System (NPDES) Program
404 - Clean Water Act Section 404 Wetlands Protection Program
PWS - Safe Drinking Water Act Public Water Supply Supervision (PWSS) Program
UIC - Safe Drinking Water Act Underground Injection Control (UIC) Program
PEST - Pesticide Cooperative Agreements

X = Tribe has been determined eligible for TAS by EPA/or has had program approval (PA) where TAS does not apply under the specified program.

P = Applications that have been submitted to an EPA Region and are pending an EPA determination.

Please call Clara Mickles of the American Indian Environmental Office at (202) 260-7519 to make changes or additions.

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Region 1										
Narragansett - RI	X	X								
Houlton Band Of Maliseets - ME	X		P							
Mashantucket Pequot - CT	X									
Penobscot Indian Nation - ME	X									
Wampanoag Tribe of Gay Head (Aquinnah) - MA	X		P							
Region 2										
St. Regis Mohawk - NY	X									
Region 4										
Eastern Band of Cherokee Indians - NC	X	X	X	X						
Miccosukee Indian Tribe of Florida - FL	X			X						
Poarch Bd of Creek Indians - AL	X	X	X							
Seminole Tribe of Florida - FL	X		X	X						

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Region 5										
Grand Portage Band of Chippewa - MN	X			X						
Bois Forte - MN	X			P						
Forest County Potawatomi Tribe - WI	X									
Fond du Lac Band of Chippewa - MN	X			X						
Keweenaw Bay Indian Community - MN	X			P						
Sault Ste. Marie Tribe - MI	X					P				
Leech Lake Band of Chippewa - MN	X	X		P						X
Lac du Flambeau Band of Chippewa- WI	X	X								
Menominee Tribe - WI	X	X								
Mille Lacs Band of Ojibwe - MN	X	X	P	P				X		
Minnesota Chippewa Tribe - MN	X	X								
Mole Lake Sokaogon Chippewa - WI	X	X		X						
Oneida Nation - WI	X									

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Red Cliff Chippewa - WI	X									
Red Lake Chippewa Tribe - MN	X	X		P						
Stockbridge-Munsee Tribe - WI	X									
White Earth Band of Chippewa - MN	X	X								X
Bad River Band of Lake Superior Chippewa - WI	X									
Lac Courte Orielles Band of Chippewa - WI	X									
St. Croix Band of Chippewa - WI	X									
Grand Traverse Reservation, MN	P									
Lower Sioux Indian Community of Minnesota, MN	P									
Upper Sioux Community of Minnesota, MN	P									
Little Traverse Bay Bands of Odawa Indians, MI	P									
Region 6										

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Acoma Pueblo - NM	X	X								
Kaw Nation - OK	X									
Isleta Pueblo - NM	X			X						
Nambe Pueblo - NM	X			X						
Tesuque Pueblo - NM	X			X						
Picuris Pueblo - NM	X			X						
Pojoaque Pueblo - NM	X			X						
Pawnee Tribe of Oklahoma				P						
Sandia Pueblo - NM	X			X						
San Juan Pueblo - NM	X	—		X						
Santa Clara Pueblo - NM	X			X						
Jicarilla Apache - NM	X	X	X							X
Taos Pueblo - NM	X									
San Il Defonso Pueblo - NM	X									
Region 7										
Kickapoo Tribe - KS	X									
Omaha Tribe - NE	X									P
Santee Sioux Tribe - NE	X									P
Winnebago Tribe - NE	X									P

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Potawatomi - KS			X							
Region 8										
Uintah-Ouray - UT	X									
Blackfeet Tribe - MT	X	X								
Confederated Salish & Kootenai Tribes - MT	X			X		P				
Cheyenne River Sioux - SD	X									X
Crow Tribe - MT	X									
Ft. Belknap - MT	X						X			
Ft. Berthold Three Affiliated Tribes - ND	X		P	P –						X
Ft. Peck Assiniboine & Sioux Tribes - MT	X		X	X				P		
Rocky Boys - MT	X									
N. Cheyenne Tribe - MT	X									
Oglala Sioux Tribe - SD	X		P	P						X
Rosebud Sioux Tribe - SD	X									X
Shoshone & Arapahoe Tribes - WY	X	X								
Southern Ute Tribe - CO	X	X	X	P						

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Standing Rock Sioux Tribe - SD/ND	X						P			X
Turtle Mountain Tribe - ND	X	X								
Ute Mountain Ute Tribe - CO	X	X								
Yankton Sioux Tribe - SD	X									
Spirit Lake Sioux Tribe - ND	P									
Paiute Bands - UT	P									
Crow Creek Sioux - SD	X									X
Sisseton-Wahpeton Sioux Tribe - SD	X			P						
Lower Brule - SD	X									
Region 9										
Agua Caliente Band - CA	X									
Augustine Band - CA	X									
Big Pine Tribe - CA	X									
Big Valley Band - CA	X									
Bishop Pauite Tribe - CA	X									
Campo Band of Kumeyaay Indians - CA	X		X	P						

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Colorado River Tribe - AZ	X	X								X
Coyote Valley Band of Pomo Indians- CA	X			P						
Fort Independence Tribe - CA	X									
Fort Mohave Tribe - AZ	X	X								X
Gila River Tribe - AZ	X									X
Hoopa Valley - CA	X		P	X		P				
Hopi Tribe - AZ	X									
Hopland Band of Pomo Indians - CA	X									
Hualapai Tribe - AZ	X		P							
Lone Pine Tribe - CA	X									
Morongo Band of Mission Indians - CA	X									
Manzanita - CA	X									
Navajo Nation - UT/AZ/NM	X				P		P	P		X
Pala Band - CA	X									
Pyramid Lake Paiute Tribe - NV	X									
Quechan Indian Tribe - AZ	X		P							X

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Round Valley Tribe - CA	X									
Rincon Band - CA	X		P							
San Pasqual -CA	P									
Twenty-Nine Palms Band - CA	X									
White Mountain Apache Tribe - AZ	X			X						
Yurok Tribe - CA	X									
Cabazon Band of Cahuilla Mission Indians - CA	X									
Shoshone Paiute Tribes of Duck Valley - NE/ID	X									
San Carlos Apache - AZ	X									
Karuk Tribe - CA	X									
Havasupai Tribe - AZ	P									
Yavapai Prescott Tribe - AZ	X									
Walker River - NV	X									
Pauma-Yuima Band - CA	X									
Cocopah - AZ	P									X
La Jolla - CA	X									

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Salt River Pima-Maricopa Indian Community - AZ	X									X
Fort McDowell Mohave - Apache Indian Community - AZ	X									
Saboba Band of Luiseno Mission Indians - CA	P									
Temecula Pechanga - CA	X									
Benton Paiute Utu Utu - CA	X									
Region 10										
Confederated Tribes of the Chehalis Reservation- WA	X			X						
Colville Tribe - WA	X		X							
Coeur d'Alene Tribe - ID	X	X								X
Grand Rhonde - OR	X									
Kalispel Tribe - WA	X									
Jamestown S'klallam - WA	X									
Lower Elwha Tribe - WA	X									
Lummi Tribe - WA	X			P			P			
Makah Tribe - WA	X									

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Muckleshoot Tribe - WA	X									
Nez Perce Tribe - ID	X	X								
Port Gamble Klallam Tribe - WA	X									
Puyallup Tribe - WA	X			X						
Quileute - WA	X									
Shoalwater Bay - WA	X									
Shoshone-Bannock Tribes - ID	X									X
Siletz - OR	X									
Skokomish Tribe - WA	X									
Spokane - WA	X			P						
Squaxin Island - WA	X									
Suquamish Tribe - WA	X									
Swinomish Tribe - WA	X									
Confederated Tribes and Bands of the Yakama Indian Nation - WA	X	X		P						
Umatilla Tribe - OR	X	X	X							

TRIBE	106	314	319	303/ 401	402	404	PWS	UIC	AIR	PEST
Tulalip Tribes - WA	X	X		X						
Warm Springs - OR	X			P	P					
Klamath Tribe - OR	X	X								

Supreme Court, U.S.
FILED
JUN 26 1998
CLERK

No. 97-1929

In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT TRIBES IN OPPOSITION

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QUESTION PRESENTED

Did the Environmental Protection Agency properly promulgate and act upon federal regulations establishing Agency procedures necessary to determine on a case-by-case basis whether it should treat a Tribal government as a state for purposes identified by Congress in Section 1377 of the Clean Water Act?

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The opinion of the Court of Appeals reported at 137 F.3d 1135 (9th Cir. 1998), is reproduced in the Petition at Pet. 1a. The opinion of the District Court (Pet. 16a) is reported at 941 F.Supp. 945 (D. Mont. 1996).

JURISDICTION

Judgment of the Court of Appeals was entered on March 3, 1998. The petition for writ of certiorari was filed on May 29, 1998. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This judicial review of the exercise of Agency statutory discretion arises out of an Environmental Protection Agency rulemaking and decisional process exclusively within the parameters of the following statutes and regulations:

1. Clean Water Act of 1972, as amended, 33 U.S.C. § 1251-1387 (1997), specifically § 1377, reproduced at Pet. 130a.

2. Water Quality Standards: Requirements for Indian Tribes to Administer a Water Quality Program, 40 C.F.R. § 131.8 (1997), reproduced at Pet. 113a.

INTRODUCTION

If Congress had not enacted the Clean Water Act (33 U.S.C. § 1251 et seq., 1997), this case would not exist. In 1987 Congress amended the Clean Water Act to add § 1377, entitled "Indian tribes," which authorizes the Environmental Protection Agency ("EPA") to treat Tribal governments as the functional equivalent of states for enumerated programs. Pet. 130a. Congress vested EPA with broad statutory discretion to promulgate regulations to implement the statute. 33 U.S.C. § 1377(e). EPA properly engaged in the rulemaking process (Pet. 92a) and in accordance with those regulations determined that the Confederated Salish and Kootenai Tribes ("Tribes") should be "treated as a state" under § 1377 for the purpose of establishing surface water quality standards for waters within the Flathead Indian Reservation. Pet. 50a. EPA retained *all* permitting and enforcement authority under the Act. Pet. 50a. Petitioners brought suit seeking judicial review of these Agency actions under the Administrative Procedures Act, 5 U.S.C. § 701 et seq. (1997). In a summary judgment proceeding, the trial court found that "EPA's final decision is supported by the administrative record, consistent with EPA's regulations, and not contrary to law, and should be upheld." Pet. 48a. The appeals court affirmed. Pet. 1a.

Petitioners seek to ignore this history and their active participation in all aspects of it. They minimize the controlling role of Congressional and federal agency actions pertaining to the Clean Water Act, an act EPA is uniquely qualified to implement. Instead they seek to place before this Court a case of their own making, which, if successful, would require the Court to ignore its prior decisions

on the scope of Tribal authority in *Montana v. United States*, 450 U.S. 544 (1981), *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), and *Strate v. A-1 Construction*, 518 U.S. 1056, 117 S.Ct. 1404 (1997), as well as controlling decisions addressing the very EPA discretionary authority at issue in this case, notably *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), *Milwaukee v. Illinois*, 451 U.S. 304 (1980), and *Chevron v. Natural Resource Defense Council*, 467 U.S. 837 (1984).

Petitioners are asking this Court to review a judicial decision no court has made and a statute Congress did not enact. This Court has previously declined a nearly identical invitation involving the same statute, regulations, and arguments in *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 118 S.Ct. 410, 139 L. Ed. 2d 314, 65 U.S.L.W. 3194 (Nov. 10, 1997), a case notably absent from the Petition. Certiorari should be denied here also.

STATEMENT OF THE CASE

Congress enacted the Clean Water Act, as amended, "clearly to establish an all-encompassing program of water pollution regulation. Every point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the *administrative apparatus established by Congress* to achieve its goals." *Milwaukee*, 451 U.S. at 318 (emphasis added).

The Clean Water Act (hereafter "Act") originally only allowed delegation of federal water pollution programs to state governments that satisfied federal requirements.

In 1987 Congress amended the Act to include 33 U.S.C. § 1377, entitled "Indian tribes". Pet. 130a. "That section authorizes EPA to permit Indian tribes 'to be treated as a state' (TAS) for purposes of promulgating water quality standards" under Section 1313 of the Act. (33 U.S.C. § 1313 (1986)). *State of Montana v. United States Environmental Protection Agency and Confederated Salish and Kootenai Tribes*, 137 F.3d 1135, 1138 (9th Cir. 1998) (Pet. 4a); *Albuquerque*, 97 F.3d at 418.

Of central importance to this case, by enacting § 1377(e), Congress expressly granted the EPA Administrator extensive rule making authority for TAS purposes. In so doing, "Congress has vested in the Administrator broad discretion" to apply EPA's expertise to establish appropriate regulations to fulfill the federal policies of the Act. *Arkansas*, 503 U.S. at 105.[1] The federal policy behind § 1377 is one of recognizing, under three specific

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[1] EPA is the federal agency that is uniquely qualified to administer and implement water quality programs under the Act. *Arkansas*, 503 U.S. 91 (1992). Additionally, EPA is the Agency with the "expertise and experience in reconciling" questions of both Indian policy and environmental policy gained through administration of federal environmental statutes on Indian reservations. *Washington Department of Ecology v. Environmental Protection Agency*, 752 F.2d 1465 (9th Cir. 1985). *See also Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981). Since *Nance*, EPA has gained nearly two decades of additional expertise in the area.

criteria contained therein,[2] the right of a tribe, *inter alia*, to establish water quality standards for surface waters within Reservation boundaries. Furthermore, when as in this case, the agency decision involves scientific determinations within an area of special expertise, "a reviewing court must generally be at its most deferential." *Baltimore Gas and Electric v. Natural Resource Defense Council*, 462 U.S. 87, 103 (1983).

The provisions of § 1377 define the extent of the exercise of the "Agency's statutory discretion." *Arkansas* at 105. The provisions of § 1377 (Pet. 130a), EPA's implementing regulations (Pet. 113a), and the Agency decision to treat the Tribes as a state for the purpose of establishing water quality standards under § 1313 of the Act (Pet. 50a) are the Congressionally-established "administrative apparatus" the *Milwaukee* Court identified as defining the proper limits of this litigation.

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[2] The statutory criteria to be applied by EPA in determining whether a tribe is to be treated as a state under the Act are:

> (1) The Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are . . . within the borders of an Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, *in the Administrator's judgment*, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. § 1377(e) (emphasis added).

The EPA decision at issue here (Pet. 50a) recognized the Tribes as a state only for purposes of establishing surface water quality standards under 33 U.S.C. § 1313 and issuance of water quality certifications under 33 U.S.C. § 1341 for "waters of the United States"[3] that occur within the exterior boundaries of the Flathead Indian Reservation.[4] As with state water quality standards in a non-Reservation setting, the Tribal standards, promulgated in each instance with substantial guidance from the EPA, "are part of the federal law of water pollution control." *Arkansas* at 110.

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[3] The Congressional goal of the Act is to control, at the source, pollution of "navigable waters of the United States." 33 U.S.C. § 1251; 33 U.S.C. § 1362(7). The Act provides for various Federal, Tribal and State programs to address surface water pollution. The Act does not authorize any government to engage in land use regulation. Nevertheless, Petitioners persist throughout their brief in intimating that this is a case in which EPA unlawfully sanctioned an exercise of Tribal regulatory authority over land use. Neither Congress nor EPA did what Petitioners allege.

[4] Congress authorized EPA to treat Tribes as states for all surface waters within the borders of a Reservation. The geographic scope of a Reservation is defined at § 1377(h)(1) as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." Congress therefore, anticipated a unitary set of Tribal water quality standards, regardless of land ownership. Petitioners' fee/trust distinction, the gravamen of the Petition, flies in the face of plain language of the Act. Just as Congress opened the Reservation to non-Indian land acquisition (Pet. 2), here Congress authorized EPA to accept the application of Tribal water quality standards to waters traversing that same land.

Contrary to Petitioners' spectral vision of "coercive" and "unrestrained" Tribal powers arising out of the EPA decision (Pet. at 15, 18), the Tribes engage in *no* permit or enforcement proceedings for *any* activity subject to the Act. As with state water quality programs, EPA may, and in fact does here, retain all permitting and enforcement authority under the National Pollutant Discharge Elimination System ("NPDES") program (33 U.S.C. § 1342) throughout the Reservation. Federal NPDES permits are the permits at issue and Petitioners acknowledge they are obligated to obtain them under the Act. Pet. 3. The Tribes chose not to seek delegation of that TAS. Therefore, in accordance with the clear authority under the Act (33 U.S.C. § 1342(b) and (c)), EPA retained permitting an enforcement authority on the Reservation. The TAS approval document at issue expressly put the Petitioners on notice that "This approval does not provide any additional authorities (*e.g. permitting, enforcement*) beyond the water quality standards and water quality certification programs." Pet. 50a (emphasis added). *See also* Pet. 21a-22a.

The practice of EPA applying state (here Tribal) water quality standards to an EPA-issued NPDES discharge permit comports with this Court's analysis in *Arkansas*. There, a downstream state challenged upstream discharges under a 'competing sovereigns' jurisdictional analysis. This Court found it "unwise to evaluate those arguments in a case such as these [sic], which only involve a federal permit." *Arkansas* at 104. This case only involves federal permits. The Tribes issue *no* permits under the Act. There, as here, the exercise of judicial

restraint in the face of an Agency action that fulfills the policy of the Act is proper.

ARGUMENT

THE PETITION FAILS TO SATISFY ANY OF THE ELEMENTS OF RULE 10 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

1. The Decision Here Does Not Conflict With Any Federal or State Court Decision (Rule 10(a)).

As the Ninth Circuit noted, the decision in *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 118 S.Ct. 410, 139 L.Ed.2d 314, 65 U.S.L.W. 3694 (Nov. 10, 1997), the only Circuit decision to address this same set of questions, is entirely consistent with this case. Pet. 13a. Pursuant to an EPA TAS grant, the Isleta Pueblo established water quality standards that would require the off-Reservation upstream City of Albuquerque to expend significant resources to upgrade its sewage treatment facility. This was necessary to attain Tribal standards on Pueblo waters. The City sued, arguing that Tribal sovereign powers were insufficient to justify this *off-Reservation* impact on a political subdivision of the State.[5] *Albuquerque* at 421-423. The City unsuccessfully

[5] Petitioners argue (Pet. 18-19) that the instant case is the first instance of an appeals court confirmation of Tribal authority over governmental activities of a state or its political subdivisions. *Albuquerque* demonstrates otherwise, and in the arguably more attenuated off-Reservation setting. Furthermore, § 1377(e) of the Act provides a mechanism to address such a dispute, should it even occur. *See Albuquerque* at 427-428.

argued that EPA acted arbitrarily and capriciously in this regulatory framework, that EPA erred in its analysis of Tribal sovereign authority, and that the decision to grant TAS was therefore improper.

The statute and EPA regulations at issue here are the same as in *Albuquerque*. The TAS grant there, as here, rests on EPA's reliance upon those regulations. There, as here, the "substantial statutory discretion" vested by Congress in EPA to establish the regulatory framework for implementation of § 1377 was upheld by the circuit court under the Court's rationale in *Arkansas* and *Chevron*, confirming the parameters of judicial review of Agency actions. *Albuquerque* at 421-423; *Montana v. EPA*, Pet. 11a, 45a.

The Petitioners fail to even mention *Albuquerque*, the only other circuit court decision on the subject. This is particularly disturbing in light of the Ninth Circuit conclusion that the instant case "is fully consistent with the only other circuit opinion that has yet considered the issue of tribal authority to set water quality standards." Pet. 13a. Instead, Petitioners raise *Narragansett Indian Tribe v. Narragansett Electric Co.*, 89 F.3d 908 (1st Cir. 1996) and allude to it as a conflict between the Circuits. The *Narragansett* decision does not deal with Reservation land but rather a question of applicability of local land use regulation to a Tribal land base recently established by a special Congressional Settlement Act that authorized concurrent state and Tribal jurisdiction on certain subjects. *Narragansett* at 913, 915. The only mention of the Clean

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Petitioners did not even attempt to exhaust that Congressionally-established dispute resolution mechanism.

Water Act is a passing reference in the second to the last sentence of the published opinion. *Id.* at 922. That decision does not involve a conflict over a TAS decision made by EPA. *Narragansett* is simply inapposite. Petitioners cannot demonstrate any conflict between the circuits, for none exist.

2. The EPA Decision Comports With Proper Agency Procedures And Represents A Prudent Analysis of Tribal Authority.

The decision follows the rules on judicial review of an Agency action outlined in *Arkansas*, *Milwaukee*, and *Chevron* and therefore cannot be interpreted as having departed from the usual course of judicial review of an Agency action. Ignoring that altogether, Petitioners seek to minimize the controlling nature of that precedent with a fabricated argument that the TAS decision is predicated upon EPA's erroneous interpretation of the doctrine of inherent Tribal sovereign powers found in *Montana v. United States*, 450 U.S. 544 (1981) and the plurality opinions in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Petitioners argue that because EPA allegedly erred in its legal analysis of *Montana* and *Brendale*, the regulations upon which this TAS decision is based are unlawful.

Petitioners cannot escape the fact that the boundaries of this case are defined by the rule that:

> considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations 'has been consistently followed

> by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies'

Chevron at 844 (footnote omitted) (quoting *United States v. Shimer*, 367 U.S. 374, 382-383 (1961). During its public rulemaking process EPA extensively evaluated the *Montana* standard: that even in the absence of Congressional action, "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* at 566. Pet. 96a-112a. EPA also analyzed the several plurality opinions of *Brendale*, which upheld *Montana*, *id.* It then revised the rule to require a Tribe to demonstrate not just "some" effect, as posited in *Montana*, but rather "serious and substantial impacts" (Pet. 101a) to tribal interests.[6] Rather than being arbitrary and capricious, the Ninth Circuit found this to be a "prudent"

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[6] In spite of clear language to the contrary, Petitioners argue that EPA has applied a *per se* rule ("a virtually irrebuttable presumption" Pet. 11) that if a Tribe applies for TAS on any aspect of the Act it will get it. Pet. 6. The regulations belie this. For example, as the Final Rule states:

> EPA rejects the suggestion of other commentators that EPA make a conclusive statement regarding the extent of Tribal jurisdiction over fee lands for all Tribes and all waters or even a statement regarding any particular reservation, except in the context of an actual treatment as a State application.

Pet. 99a. This imminently rational Agency decision comports with the regulatory direction of determining the applicability of § 1377 on a "case-by-case basis, based upon factual findings". Pet. 101a.

melding of the two decisions of this Court into an operating regulation. That EPA decision comports with this Court's rule that:

> The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

Chevron at 843, note 11 (citations omitted).

Petitioners interpret *Brendale* to have constricted severely the *Montana* test. They argue that after *Brendale*, the remaining attributes of inherent tribal authority over nonIndians within Reservations consists of the right to punish *tribal* offenders, determine *tribal* membership, regulate domestic relations among *tribal* members, and to prescribe rules of inheritance for *tribal* members. Pet. 15-16.

Petitioners' reading of *Montana* and *Brendale*, a version they argue EPA should have adopted by regulation, is erroneous for two reasons. First, Petitioners' interpretation of this Court's rulings would uphold an exercise of inherent Tribal authority over nonIndians only when it has no effect on nonIndians. Second, it ignores the subject matter of the cases, as well as the *Montana* standard. *Montana* addressed competing state and tribal claims to regulate Reservation hunting and fishing. *Brendale* addressed a similar conflict over land use planning.[7]

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[7] As this Court has noted, land use planning "in essence chooses *particular uses* for the land; environmental regulation, at its core, does not mandate particular uses of the land but

Neither hunting nor zoning is squarely addressed in a pervasive Congressional framework, let alone an Act of Congress with a TAS provision such as § 1377. Here, on the other hand, the Clean Water Act preempts the field of water pollution control and Congress expressly recognized a Tribal role for all surface waters within Reservation boundaries.

Petitioners also argue that *Strate v. A-1 Contractors*, 518 U.S. 1056, 117 S.Ct. 1404 (1997) further constricts the *Montana* test, a proposition the opinion itself belies. As with *Montana* and *Brendale*, the subject matter of *Strate* did not involve a pervasive federal legislative framework such as the Clean Water Act. Rather, "It 'arose between two non-Indians involved in [a] run-of-the-mill [highway] accident' " on a Reservation road, a situation this Court found " 'distinctly non-tribal in nature' ". 117 S.Ct. at 1415. The *Strate* Court relied upon the continued validity of the *Montana* test, not its demise.[8] It can hardly be

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requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulations as distinct activities." (Emphasis added). *California Coastal Construction Commission v. Granite Rock Co.*, 480 U.S. 572, 587 (1987) (upholding environmental regulation even in absence of ability to engage in general land use regulation, *id.* at 587-589).

[8] In fact *Strate* identifies *Montana* as the "pathmaking case concerning tribal civil authority over nonmembers." *Id.* at 1409. The Court found that the *Montana* opinion confirmed that "even where Congress has not expressly authorized it, tribal civil jurisdiction may encompass nonmembers." *Id.*

Strate found that *Montana* "described a general rule that absent a different Congressional direction," Tribal jurisdiction is

error for EPA to have followed the guidance that has been subsequently affirmed by this Court.

Here, EPA engaged in a regulatory process to reconcile the Congressional policy of treating Tribes as states for surface waters of the United States within the Reservation (§ 1377(h)(1)) with Petitioners' conflicting policy of opposing Tribal jurisdiction over nonIndians, and reached a prudent balance. That balance should not be disturbed. When Congress vests an agency such as the EPA with regulatory authority it "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Congress directed EPA to promulgate implementing regulations (§ 1377(e); Pet. 133a) and specifically required the Administrator to consult with tribes and states. Petitioners concede they participated, as Congress directed. Pet. 8. The voluminous Administrative Record makes that clear. The preamble to the Final Rule confirms this. Pet. 95a. The Administrative Record is replete with Petitioner's input into the regulatory process. While the Tribes perceive § 1377 to be clear and concise on its face regarding tribal jurisdiction over reservation water quality, EPA thought otherwise. Therefore, pursuant to Congressional direction, EPA promulgated the contested regulations. "Such legislative regulations are given controlling weight unless they are

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limited. *Id.* at 1409-1410. § 1377 is that "Congressional direction," envisioned by this Court. The opinion of Justice White in *Brendale*, 492 U.S. at 428, in which the Court refers to § 1377 as a delegation of federal authority to tribes, rather than to states, highlights the clarity of the statute.

arbitrary, capricious, or manifestly contrary to the statute." *Chevron* at 844 (citations omitted). Since EPA applied a prudent *Montana/Brendale* analysis, as the lower courts determined, the regulations are sound.

3. Petitioners Misrepresent The Plain Language Of The Clean Water Act.

Having failed to demonstrate the existence of conflict in judicial decisions, Petitioners attempt to create a complex federal question demonstrating a compelling reason for this Court to accept the case. They argue that no one has, or can, demonstrate that Montana's water quality laws have been preempted on non-Indian fee Reservation lands. They argue that Congress "did not preempt state law in the 1987 (§ 1377) amendments to the Act." Pet. 17.[9] Petitioners argue that a different conclusion would be

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[9] This theory ignores the plain reading of the Act – that absent express delegation to a state, EPA retains all program authority for water quality purposes. 33 U.S.C. § 1342. Petitioners cite to no delegation from EPA to Montana to operate a state water quality program on the Flathead Indian Reservation, for none exists. EPA stated that it "has never formally approved state water quality standards within the exterior boundaries of an Indian reservation because it prefers cohesive administrative management to fragmented administrative management" inherent in the checkerboard system Petitioners advocate. Brief of the Federal Appellees to the Ninth Circuit at p. 40, September 30, 1996. In fact, as the Administrative Record, AR 4, Ex. 10 (Montana Administrative Rules § 16, Water Quality Standards in force prior to this conflict) demonstrates, prior to this case Montana expressly disclaimed water quality standards authority on all Reservations in its rules.

incompatible with 33 U.S.C. § 1370, "which specifically disclaims any intent '[e]xcept as expressly provided' to 'impair [ ] or in any manner affect [ ] any right or jurisdiction of the States.' " Pet. 17. The full text of § 1370 tells a much different story.[10]

Petitioners selectively delete critical statutory language from § 1370. In relevant part, § 1370 actually reads that "[e]xcept as expressly provided *in this chapter*, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such states." (emphasis added). Petitioners simply deleted the emphasized language when presenting § 1370 to this Court. Pet. 129a. The TAS statute, § 1377 is in "this chapter" and is the "Congressional direction" identified in *Montana* and *Strate*. It expressly authorizes EPA to treat Tribes as states. No amount of selective editing by Petitioners can change that Congressional vesting of authority in EPA. The City of Albuquerque tried a similar and unsuccessful argument under § 1370. *Albuquerque* at 423. That argument failed there and should here.

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[10] This Court has previously classified § 1370 as a "savings clause" that merely protects state-law suits from preemption by the Acts' citizen-suit provisions. *International Paper Co. v. Quellette*, 479 U.S. 481, 492 (1986); *See also Arkansas v. Oklahoma*, at 99-100; *City of Albuquerque v. Browner*, 97 F.3d at 423.

4. This Case Does Not Involve A State Court Decision On An Issue Of Federal Law (Rule 10(b)).

This case does not involve any state court decision on any federal question and therefore doesn't fall within the provisions of Rule 10(b). The Petition relies exclusively on federal statute, regulation and caselaw.

5. There Is No Conflict With Relevant Decisions Of This Court (Rule 10(c)).

The lower court decisions upheld important and well-established principles of law defining the role of the courts in a judicial review of an Agency action. As discussed above, the decisions comport, rather than conflict, with the relevant decisions of this Court. Accordingly, the Petitioners also fail to satisfy the third and final element of Rule 10(c).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

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STATE OF MONTANA, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF ARIZONA, CALIFORNIA, COLORADO, FLORIDA, IDAHO, MICHIGAN, NEBRASKA, NEVADA, SOUTH DAKOTA, UTAH, AND WISCONSIN, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTEREST OF THE AMICI CURIAE

Amici curiae are states of the United States, acting through their Attorneys General, that have a strong interest in the treatment of Indian tribes as states (TAS) for purposes of implementing provisions of the Clean Water Act with respect to waters within the exterior boundaries of reservations. Amici curiae are among the states in which approximately 210 tribes have applied for TAS status. (Pet. 135a). In some of the states, such as Wisconsin, EPA has already granted TAS status to tribes; the remainder expect the same will occur as a matter of course when tribes residing within their borders submit applications to EPA.

The amici share with Montana a common interest in ensuring that EPA's approach to conferring TAS status upon tribes is

faithful to the applicable principles of Indian law established by this Court. Despite the varying characteristics of reservations, including such factors as size, treaty history, and demographics, EPA essentially approves tribal applications for state status on a pro forma basis, without regard to a reservation's individual characteristics and without regard to the existence of state water quality regulations that adequately protect health, welfare, and the environment.

The experience in Wisconsin exemplifies the severe problems posed by the pro forma granting of tribal requests for state status under the Clean Water Act. Wisconsin has eleven Indian tribes and bands, each of which has reservation land within the state's borders. The reservations range in size from over 200,000 acres (Menominee) to 1,700 acres

(Sokaogon Chippewa Community) to tiny, scattered parcels recently declared reservations (Ho-Chunk Nation).[1] A map in the appendix to this brief shows the reservation lands in Wisconsin. (Am. 35a).

Four tribes in Wisconsin have sought state status pursuant to section 518(e) of the Clean Water Act, and all four received approval by EPA based upon the assertion that there was water on the reservation that tribal members use--the only showing required under EPA's generous test. Wisconsin challenged each of the four TAS designations in lawsuits in the state's

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[1]For example, in 1986 the Secretary of the Interior proclaimed as reservation lands several parcels owned by the Ho-Chunk Nation, including a 4 1/2-acre parcel on the outskirts of Madison, Wisconsin, and a 2-acre parcel in Jackson County, Wisconsin. 51 Fed. Reg. 41,669, 41,670 (11/18/86); 52 Fed. Reg. 16,461 (5/5/87).

two federal district courts. None of the cases has been decided on its merits.[2]

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[2]During the litigation, two EPA officials alleged that other agency staff members had engaged in misconduct, namely the falsification of key parts of the administrative records. Ensuing discovery revealed compelling evidence that EPA staff had backdated the agency's factual findings in at least three of the four cases, in an apparent effort to bolster the records for appeal. One tribe (Menominee) voluntarily withdrew its TAS application after-the-fact, thereby relinquishing its state status; in the other two, EPA rescinded its decisions granting state status (Lac du Flambeau and Oneida). One of the original four TAS determinations remains pending in district court, awaiting decision on summary judgment. State of Wisconsin v. U.S.E.P.A. and Sokaogon Chippewa Community, Case No. 96-C-90 (E.D. Wis.). In addition, the Oneida Nation of Wisconsin has appealed the dismissal of the lawsuit challenging its receipt of state status. State of Wisconsin v. U.S.E.P.A. and Oneida Nation of Wisconsin, Case No. 96-C-329 (E.D. Wis.), on appeal to the Seventh Circuit Court of Appeals as Case No. 98-2374.

Fallout from this episode also led to the creation of an agency-wide workgroup to review EPA's process for making TAS decisions (Am. 13a-25a). That effort also produced EPA's latest "Montana Test Guidance" (Am. 26a-34a) which is of particular relevance because it shows

(continued...)

The historic reservation of one of the four tribes previously accorded state status, the Oneida Tribe of Indians of Wisconsin, illustrates the serious jurisdictional conflicts that TAS status can engender. The reservation contains approximately 65,000 acres, much of which is urban and suburban in character. In fact, over 4,000 acres of the historic reservation lie within the city limits of Green Bay and comprise approximately 15% of the total land area of that city. At the time it applied for treatment-as-state status, the tribe or its members owned only 13% of the property on this historic reservation--leaving 87% owned by nonmembers. Two towns established in 1908 and 1910 lie entirely within the

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[2](...continued)
EPA's continuing disregard for this Court's decision in Strate v. A-1 Contractors, __ U.S. __, 117 S. Ct. 1404 (1997).

boundaries of the historic reservation; as of 1990 the population of one of the towns was approximately 82% non-Indian and the population of the other was approximately 64% non-Indian.

Not surprisingly, numerous public facilities are located on the historic reservation, including schools, roads, parks and even the Green Bay airport. The various local governments provide such services on the reservation as fire protection, law enforcement, emergency response, public education and social services, and also administer zoning and other ordinances within the historic reservation boundaries. Under EPA's TAS policy, many dischargers, including public as well as private entities, would have to obtain water quality certification from the tribe as a condition of receiving a discharge permit. This could affect activities ranging from general real

estate development to road repairs, and reaches discharges occurring off-reservation, but upstream of the reservation. See Arkansas v. Oklahoma, 503 U.S. 91, 105-06 (1992).

Notwithstanding the obvious "open" nature of the reservation, under Brendale analysis,[3] in determining whether to grant the Oneida Tribe's application for state status, EPA found irrelevant the urbanized character of the reservation, the high degree of nonmember land ownership, and the history of the reservation. Rather, EPA considered only whether there was water on the reservation used by tribal members. (Am. 3a-12a). Nor does EPA consider relevant the size of the reservation area, treating large reservations such as the Flathead Indian

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[3]See Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 444-45 (1989)(Stevens, J.).

Reservation the same as very small ones, which can sometimes comprise only a few acres.[4] State status grants tribes essentially a veto power over applications for federal permits under the Act, because certification by the tribe that the proposed discharge would comply with the tribe's water quality standards is a prerequisite for the granting of a permit. (33 U.S.C. §§ 1341 and 1377). If the decision of the court of appeals is affirmed, and the rationale of its opinion is followed in other cases, all residents of Indian reservations--as well as upstream dischargers--will be subject to virtually automatic regulatory control by

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[4]For example, EPA readily granted state status under the Clean Water Act to the Sokaogon Chippewa Community in Wisconsin--whose reservation comprises only 1,700 acres--notwithstanding EPA's avowed policy against "checkerboarding" jurisdiction.

the tribal government in the event the tribe applies to EPA for TAS status.

Compounding the impacts of TAS status, EPA has created a double standard with respect to citizens' rights to obtain judicial review of permitting decisions. EPA formally recognizes that the Clean Water Act requires states to afford adequate judicial review procedures for state regulatory decisions. In fact, EPA recently promulgated a rule specifying that to operate an approved program under section 402 (33 U.S.C. § 1342), a state must provide for adequate judicial review of permit decisions. 40 C.F.R. § 123.30 (1997).

While with one hand EPA acknowledged the critical importance of judicial review to the integrity of state-administered programs, with the other it proceeded to exempt tribes from the same requirement. 40 C.F.R. § 123.30 (1997). This leaves

nonmembers exposed to regulation by tribes, with no right to representation or participation in the tribal government and no right to meaningful judicial review of important regulatory decisions. The amici states have a strong interest in protecting the rights of their citizens, as well as themselves, to meaningful judicial review of regulatory decisions affecting them by preventing unwarranted extension of state status to tribes.

EPA's TAS policies ignore the sovereignty of the states to regulate their own natural resources and citizens in a uniform and consistent manner, as well as the right of citizens to be regulated by government in which they can participate and which they can challenge in court if necessary.

II. REASONS FOR GRANTING THE PETITION

A. THE COURT OF APPEALS' DECISION NULLIFIES STRATE'S LIMITATION ON THE SCOPE OF TRIBAL SOVEREIGNTY OVER NONMEMBERS.

In its effort to promote the assumption of regulatory power by tribes, EPA has lost sight of the established precepts of Indian law, as well as the agency's own pronouncements. In place of careful, fact-intensive historical inquiry into the status of a reservation, EPA has concocted a simplistic, wooden formula under which no tribe could ever fail to receive state status under the Clean Water Act. EPA's approach to the issue of inherent tribal regulatory authority is wholly inconsistent with controlling precedent of this Court, which mandates a presumption against the existence of inherent tribal regulatory authority over

nonmember activities. Montana v. United States, 450 U.S. 544, 565 (1981).

Although Montana recognized an exception for nonmember conduct that threatens tribal health or welfare, this Court last term made clear that to qualify for the exception conduct must threaten "'the right of reservation Indians to make their own laws and be ruled by them.'" Strate v. A-1 Contractors, __ U.S. __, 117 S. Ct. 1404, 1416 (1997), quoting Williams v. Lee, 358 U.S. 217, 220 (1959). The Court found specifically that nonmember conduct that endangers safety, but not tribal self-governance, cannot give rise to a finding of tribal regulatory authority under the second Montana exception because, "if Montana's second exception requires no more, the exception would severely shrink the rule." Strate, 117 S. Ct. at 1415.

Although EPA purports to have based its TAS policy upon the second Montana exception, 56 Fed. Reg. 64,877-88 (1991), the differences between them are irreconcilable. EPA announced when it adopted its rule that its policy would be to apply "generalized finding[s]" as to the importance of water quality to tribal health and welfare to supplement the treatment as state applications of all tribes. 56 Fed. Reg. 64,878 (1991). Under the 1991 policy, if a tribe were to

> make a relatively simple showing of facts that there are waters within the reservation used by the Tribe . . . EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality . . . presume that there has been an adequate showing of tribal jurisdiction . . . unless . . . [a State] demonstrates a lack of jurisdiction on the part of the Tribe.

56 Fed. Reg. 64,879 (1991) (emphasis added).[5] The tribal showing EPA would require under this policy is nominal, at best. Any tribe that uses water from its reservation will be deemed to have regulatory jurisdiction. Contrary to Brendale, the EPA test also erroneously presumes the existence of tribal regulatory authority even in "open" reservation areas that have lost their tribal character due to a substantial transfer of land ownership to nonmembers.

Two weeks after the Court of Appeals issued its decision in this case, EPA issued its "final guidance" on the application of the second Montana exception. (Am. 21a, 26a-34a). Contrary to Strate, EPA nowhere requires a showing

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[5] See also 56 Fed. Reg. at 64,881 (1991): "the Agency presumes that, in general, Tribes are likely to possess the authority to regulate activities affecting water quality on the reservation."

that tribal authority is essential "[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." Strate, 117 S. Ct. at 1416 (quoting Montana, 450 U.S. at 564).

EPA has done precisely what Strate forbade by equating the controlled discharge of pollutants, no matter how de minimis, with impairment of tribal self-governance. This approach not only collides with Strate, but would have produced opposite outcomes in South Dakota v. Bourland, 508 U.S. 679 (1993), which found a tribe could not regulate nonmember hunting and fishing activities, as well as in Brendale, which held a tribe could not engage in zoning in an "open" reservation area.

Under EPA policy, states like the amici effectively have the burden of

proving the absence of tribal jurisdiction in order to avoid the loss of authority states would otherwise possess under the Clean Water Act. Not only is this a burden the law does not require states to bear, but as formulated by EPA, the burden is one no state can ever carry.

B. IN ASSESSING THE THREAT NONMEMBER WATER POLLUTION MIGHT PRESENT TO TRIBES, EPA AND THE COURT OF APPEALS ERRONEOUSLY IGNORE THE REGULATION OF SUCH CONDUCT UNDER EXISTING STATE AND LOCAL LAWS.

To support its generalized finding that the possibility of any water pollution rises to the level of a severe threat to a tribe under Montana, EPA erroneously presumes the absence of any existing regulation and enforcement with respect to waters within the exterior boundaries of a reservation. In other words, EPA measures the potential harm to

tribes from nonmember conduct, for purposes of the Montana "second exception," as if the nonmember conduct were not constrained in any way by the states or local governments. That is not the manner in which this Court contemplated applying the test and it does not square with reality.

In Montana itself the Court looked at the effect of existing state regulations on the disputed resource. Montana, 450 U.S. at 566 n.16. The Court did likewise in Brendale, analyzing the impacts upon the tribe of land uses that would be permissible under state and local law. 492 U.S. at 429-30 (White, J.). By evaluating assertions of inherent authority in a vacuum--by assuming that there are no state water quality laws protecting public health when the contrary is true--EPA misapplies the Montana "second exception," and stacks the deck

against the states, to justify approving tribal applications. EPA's approach negates this Court's requirement of demonstrating "necessity" for tribal regulatory jurisdiction: "exercise of tribal power beyond what is necessary to protect tribal self-government . . . is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Montana, 450 U.S. at 564 (emphasis added).

For purposes of the Montana "second exception," a threat must have some basis in reality. It is wholly artificial and unrealistic to ignore, as EPA does, that discharges of pollutants are subject to regulation and enforcement at both the state and federal levels. The real threat to a tribe is not from wholly unregulated pollution, but rather from regulated activities in light of the existing regulations and enforcement by EPA and the

states. As is true for many states, EPA has formally approved Wisconsin's water quality standards under 33 U.S.C. § 1313, finding that the standards adequately protect public health and welfare and the environment. Yet in assessing the threat posed to tribal interests EPA assumes that despite the state's regulatory system there will be such serious degradation of waters that tribal jurisdiction is "necessary" and the Montana second exception is satisfied.

The agency cannot have it both ways. EPA must acknowledge the existing reality of the regulatory mechanisms in place and properly determine who has regulatory authority over the non-Indian lands within a reservation, using the effect on tribal self-governance as the benchmark.

CONCLUSION

EPA's indifference to the factors this Court has established as relevant to determining the presence of inherent tribal authority has tainted its implementation of section 518(e). Because of the substantial impacts of EPA's policy on states, amici curiae respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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July 1998

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

Ms. Deborah Doxtator
Tribal Chair
Oneida Tribe of Indians of Wisconsin
P.O. Box 365
Oneida, Wisconsin 54155

Dear Ms. Doxtator:

It is my pleasure to inform you of my decision to approve the application of the Oneida Tribe of Indians of Wisconsin to administer the water quality standards program pursuant to the Clean Water Act. Section 303.

The Oneida Tribe has satisfied all of the requirements set forth at the Code of Federal Regulations, Title 40, Part 131.8, "Requirements for Indian Tribes to be treated as States for purposes of water quality standards", including demonstrating its authority over all water resources on the reservation.

The Oneida Tribe's water quality standards will be approved under separate cover pending review and concurrence by this office and the United States Fish and Wildlife Service.

If you have any questions or would like additional information, please contact Ms. Claudia Johnson-Schultz at (312) 886-6108.

Sincerely yours,

Valdas V. Adamkus
Regional Administrator

cc: Mr. George Meyer, Secretary,
Wisconsin DNR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO IL 60604-3590

REPLY TO THE ATTENTION OF:

MEMORANDUM

SUBJECT: Authority of the Oneida Tribe of Indians to Regulate the Quality of Reservation Waters

FROM: Marc M. Radell
Associate Regional Counsel

THROUGH: Gail C. Ginsberg
Regional Counsel

To: Valdas V. Adamkus
Regional Administrator

After reviewing the assertion by the Oneida Tribe of Indians of Wisconsin (the "Tribe") of the authority to regulate the quality of Reservation waters and the competing claim of jurisdiction raised by the State of Wisconsin, the Office of Regional Counsel believes that, under the plan established by Congress in the Clean Water Act, the Tribe has the authority to regulate the quality of all water resources within the exterior boundaries of the Oneida Reservation. We therefore recommend that, pursuant to 40 C.F.R. § 131.8(c)(4), you determine that the Tribe has adequately demonstrated that it meets

the jurisdictional requirements of 40 C.F.R. § 131.8(a)(3).

Tribal Authority Under the Clean Water Act. Section 518 of the Clean Water Act, 33 U.S.C. § 1377, sets forth Congress' plan for regulation of water resources within Indian reservations and embodies the Congressional intent that tribes regulate all water resources over which they have authority within the exterior boundaries of reservations. Specifically, Section 518(e) authorizes U.S. EPA to treat an Indian tribe "as a state" for the management and protection of those resources, including assumption of the water quality standards program.

Tribes retain attributes of sovereignty over their members and territory to the extent that such sovereignty has not been withdrawn by federal statute or treaty. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987). Accordingly, U.S. EPA assumes that tribes have the authority to regulate the activities of their members that may affect water quality and does not require tribes to submit a showing regarding the potential impacts of the activities of tribal members on the quality of reservation waters.

As explained at 56 Fed. Reg. 64,878 (1991), in evaluating whether a tribe has authority to regulate a particular activity on land owned by non-Indians within a reservation, U.S. EPA examines the tribe's authority in light of evolving case law as reflected in Montana v. United States, 450 U.S. 544 (1981), and Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989). In response to uncertainties in these

decisions regarding the standard of impact on tribal health and welfare that the activities of non-Indians within reservations must have before a tribe can regulate such activities, U.S. EPA applies as an interim operating rule a formulation of the standard that requires a showing that the potential impacts of regulated activities on the tribe are serious and substantial. However, the Agency believes that the activities regulated under the various environmental statutes it administers generally have serious and substantial impacts on human health and welfare. Furthermore, U.S. EPA has already determined that

> because of the mobile nature of pollutants in surface waters and the relatively small size of . . . water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee lands within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are (sic) very likely to impair the water and critical habitat quality of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality . . .
>
> Thus, a tribal submission meeting the requirements of § 131.8 of this regulation will need to make a relatively simple showing of facts that there are waters within the

> reservation used by the Tribe or tribal members . . . . and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe. Once the Tribe meets this additional burden, EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, presume that there has been an adequate showing of tribal jurisdiction of fee lands, unless an appropriate governmental entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction of the part of the Tribe.

56 Fed. Reg. 64,878, 64,879 (1991).

The Oneida Application. On August 25, 1995, the Oneida Tribe submitted an application to U.S. EPA for "treatment as a state" for the Clean Water Act Section 303 water quality standards program and Section 401 certification program. The application includes a statement from attorneys for the Tribe supporting the Tribe's authority to regulate water quality on all waters within its Reservation. [Attachment 1]. The Tribe asserts that it has authority to regulate water quality pursuant to the Tribe's Constitution and By-Laws.

The cover letter to the Tribe's application and an October 24, 1995,

support document [Attachments 1 and 2] discuss the effects that activities of non-Indians within the Reservation could have on Tribal health and welfare. These documents maintain that

> Members of the Oneida nation make extensive use of the Oneida Reservation's surface waters for fishing, swimming, stock watering, religious ceremonies, and indirectly as a public water supply (through groundwater recharge). In addition, the land ownership of the Oneida Nation is concentrated in the "Duck Creek Corridor" and in other areas adjacent to or containing Reservation waterways. The Oneida Nation thus bears a substantial amount of the impact of surface water pollution on the Reservation.

Letter from Deborah Doxtator to Valdas V. Adamkus, October 23, 1995, pp. 4 and 5.

Clearly, pollution of Reservation waters from any activity would have a serious and substantial impact on the health and welfare of the Tribe and its members within the meaning of U.S. EPA's jurisdictional analysis by exposing to pollutants Tribal members using the waters in any of the many ways described above. The Tribal application and support document also describe specific non-Indian activities that threaten the quality of Reservation waters, such as quarry operations, large scale development, pesticide run-off from a proposed golf-course, and potential dumping by small businesses of various chemicals into waterways and onto the ground. Any such activity subject to regulation under the

Clean Water Act could seriously and substantially affect the quality of Reservation waters and, consequently, the health and welfare of the Tribe and its members.

Wisconsin's Competing Claim of Jurisdiction. On October 2, 1995, the State of Wisconsin raised a competing claim of jurisdiction regarding the application [Attachment 3]. Citing the Brendale decision in support of its position, the State argues that the Tribe lacks authority to regulate water quality in the predominantly non-Indian, or "open", areas of the Reservation. Such areas may constitute almost 85 percent of the Reservation and contain a significant proportion of the Reservation's surface waters. Wisconsin also asserts that a minority opinion in the Brendale case requires that, before the Oneida Tribe can exercise jurisdiction over non-Indian activities, the Tribe must demonstrate that existing State standards do not adequately protect Tribal interests.

The Office of Regional Counsel does not believe that either of the State's arguments demonstrate a lack of Tribal jurisdiction over non-Indian activities within the Reservation. In analyzing jurisdictional issues in light of the Montana and Brendale decisions, U.S. EPA looks to the potential effects of non-Indian activities on Tribal health and welfare, not to the open or "closed" (predominantly Indian) character of the area. In the Brendale case, only two justices found the open or closed nature of the location of the non-Indian activity dispositive of the jurisdictional issue. The other justices applied the Montana

test. The four justices who found that the Yakima Indian Nation did not meet the Montana test based their opinion on a District Court finding that the non-Indian activity at issue would have no direct effect on the Tribe and would not threaten the Tribe's political integrity, economic security or health or welfare. The three justices who found that the Yakima Indian Nation did meet the Montana test based their opinion on their own finding that the non-Indian activity at issue would have a direct effect on the Tribe's political integrity, economic security or health or welfare. In this case, the Oneida Tribe has demonstrated that the relevant activities of non-Indians, even in open areas of the Reservation, present a serious and substantial threat to the quality of Reservation waters and, thence, to Tribal health and welfare.

Neither can we agree with the State of Wisconsin that the dicta of a two-justice opinion in Brendale establishes a requirement that, before the Tribe can regulate non-Indian activities within the Reservation, the Oneida Tribe must demonstrate that Wisconsin's water quality standards do not adequately protect Tribal health and welfare. Even if such a test did exist, the Oneida application identifies at least two Tribal uses of surface water, for religious ceremonies and as indirect public drinking water supply, not recognized by the State in its water quality program. The Wisconsin water quality standards likely do not protect uses not considered in their development.

Wisconsin Governor Tommy G. Thompson appears to raise an additional objection

to approval of the Oneida application by letter of December 20, 1995 [Attachment 4]. In that letter, he refers to the Wisconsin Public Trust Doctrine as requiring the State to hold the waters of the State in trust for all its citizens and as giving rise to his State's commitment to water quality. The State has presented a similar objection to program applications submitted to U.S. EPA by other Tribes, i.e., that because the State holds titles to the beds of navigable waters within the Reservation pursuant to the federal common law "equal footing" doctrine, the State has the duty and authority to regulate water quality within the Reservation pursuant to the Wisconsin common law "public trust" doctrine.

The equal footing doctrine provides that lands underlying navigable waters in territory acquired by the United States are held in trust for future states and that title to the submerged lands vests automatically in a state upon its admission to the Union. Shively v. Bowlby, 152 U.S. 2 (1894). Pursuant to this doctrine, the State gained ownership of lake beds within its borders when it achieved statehood in 1848. Wisconsin v. Baker, 698 F.2d 1323, 1327 (7th Cir. 1983).[1] In addition, Wisconsin courts have construed Article IX, Section 1 of the Wisconsin Constitution, which provides that the navigable waters leading into the

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[1] Neither the State nor the Tribe specifically addresses whether, upon its 1848 admission to Union, the State assumed title to the beds of waters within the Oneida Reservation, created in 1838.

Mississippi and St. Lawrence Rivers shall be common highways and "forever free", to mean that the State holds the beds of Wisconsin's navigable waters in trust for all of its citizens. State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983). State courts have interpreted the public trust doctrine as creating affirmative obligations on the State to protect and preserve its waters for fishing, hunting, recreation and scenic beauty, including at least some regulation of water quality. Wisconsin's Environmental Decade v. D.N.R., 271 N.W.2d 69 (Wis. 1978).

U.S. EPA need not conclusively answer the questions of whether the State retains title to the beds of navigable waters within the Oneida Reservation and the extent of any State jurisdiction arising from such ownership. Even if the State does hold title to water beds within the Reservation, U.S. EPA could properly conclude that the Tribe has adequate civil regulatory authority over water resources on the Reservation to establish water quality standards under Section 303 of the Clean Water Act. As discussed above, the Oneida Tribe has regulatory authority over all members of the Tribe and has demonstrated authority over the activities of non-members of non-Tribal lands within the Reservation for the purposes of establishing water quality standards. This demonstration of authority over the activities of non-members extends to activities on any non-Tribal lands within the Reservation, even water beds, because any such activities that impair water quality would likely have a serious and substantial effect on the health and welfare of the Tribe. Thus, the Tribe possesses inherent authority over all

persons on the Reservation who may engage in activities that might affect the quality of Reservation waters, regardless of whether or not the State retains title to the water beds.

Conclusion. Based upon the showing by the Oneida Tribe that all the waters within the Reservation are used by the Tribe and the assertion by the Tribe that impairment of such waters by the activities of non-Indians would have a serious and substantial effect on the health and welfare of the Tribe, we determine that the Tribe has made an adequate showing of jurisdiction over non-Indian activities within the Reservation for purposes of water quality standards and certification program authorizations. We also conclude that no other governmental authority has demonstrated a lack of jurisdiction on the part of the Tribe.

We therefore recommend that, pursuant to 40 C.F.R. § 131.8(c)(4), you determine that the Oneida Tribe has adequately demonstrated that it meets the jurisdictional requirements of 40 C.F.R. § 131.8(a)(3) for regulation of all water resources within the Reservation under the water quality standards and certification programs.

Attachments

cc: Jo Lynn Traub

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

SUBJECT: Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations

FROM: Robert Perciasepe
Assistant Administrator for the National Indian Program

Jonathan Z. Cannon
General Counsel

TO: Assistant Administrators
Regional Administrators

In a memorandum dated July 9, 1997, we established an Agency-wide workgroup to review EPA's process for making determinations on tribal applications for EPA-approved regulatory programs. That memorandum noted that "it is vital that the Agency have a clear, well-documented process to assemble and review relevant information, and decide on tribal program applications, in order to assure that the Agency makes sound decisions that can be defended successfully." The Workgroup's charge was to review the Agency's current process for making such determinations and develop recommendations, which might lead to written guidance, for improving the process to ensure reliably defensible decisions.

The Workgroup submitted its recommendations on December 23, 1997.

Before making its final recommendations, the Workgroup shared its preliminary recommendations with the Tribal Caucus of the Tribal Operations Committee (the TOC), individual tribes, and EPA offices for their review and comment. The Workgroup's final recommendations have been shared with the EPA senior managers for the Indian Program for their views.

We too have reviewed the recommendations, and considered the comments received regarding the recommendations from within the Agency and from tribes. By this memo, we accept in full the recommendations made by the Workgroup. Below we provide: 1) a summary of the Workgroup process; and 2) a description of the recommendations and a discussion of how each recommendation will be implemented.

When we initiated the review that led to these recommendations, we asked that Regions generally defer making final determinations on tribal applications for regulatory authority until the review was completed. Now that the review is completed, we request that the "Regions resume decision-making on tribal applications in accordance with the recommendations and guidance adopted today.

The Workgroup Process

The Workgroup, which was chaired by Robert G. Dreher, Deputy General Counsel, included representatives from all EPA Regions, and a number of headquarters (HQ) offices. The Workgroup developed a list of five issues to be addressed and established issue subgroups to prepare

options papers on each issue. A list of Workgroup and Subgroup members is attached as Attachment A. The five issues identified and addressed by the Workgroup were: 1) the process for maintaining and compiling administrative records for EPA determinations on tribal eligibility to run regulatory programs; 2) the appropriate consultation and concurrence role for HQ in these decisions; 3) the application of the Montana test for evaluating tribal authority over non-Indians on fee lands within reservations; 4) opportunities for stakeholder involvement on EPA decisions regarding tribal applications for eligibility to establish water quality standards under the Clean Water Act; and 5) evaluation of treatment in the same manner as state (TAS) criteria for grants.[2]

The Workgroup arrived at preliminary recommendations by the middle of October. Workgroup members solicited comments on the options and preliminary recommendations from their respective offices. Then, at the beginning of November, the Workgroup solicited comments on the options and preliminary recommendations from the Tribal Caucus of the TOC and from individual tribes. The Workgroup also provided periodic updates on its progress during the TOC's monthly conference calls.

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[2]The Workgroup also identified one longer-term issue - - the tribal role under FIFRA - - that the Workgroup recommends that Agency evaluate in the future.

The Workgroup considered comments from the TOC, individual tribes, and EPA offices. The Workgroup made several changes to the preliminary recommendations to address these comments. Finally, the Workgroup provided its recommendations to us, along with a discussion of the key considerations, comments received, and options evaluated for each issue.

Adoption and Implementation of the Workgroup Recommendations

The primary considerations of the Workgroup were to develop recommendations that will: 1) improve the consistency and legal defensibility of EPA decisions regarding tribal programs; 2) avoid burdensome procedural requirements that may unnessarily delay decisions on tribal applications; and 3) recognize the importance to tribes and EPA's Indian Program of decisions involving tribal sovereignty. The principal concerns raised by the TOC, tribes, and Regions in their comments on the preliminary recommendations were that the Agency avoid adopting procedures that will place undue burdens and delays on EPA's process for making decisions on tribal applications. The Workgroup considered and made several changes to the preliminary recommendations to address these concerns. We believe that the recommendations adopted below achieve the Workgroup's goal of significantly improving the defensibility of EPA's decisions without placing undue burdens on the decision-making process for tribal applications. To the extent the recommendations place additional burdens on the process, we believe they are warranted in order to ensure that the

Agency handles decisions pertaining to tribal sovereignty with the utmost care.

Issue 1 - - Administrative Records: Improving EPA's process for maintaining and compiling administrative records on EPA decisions regarding tribal eligibility to run regulatory programs.

Workgroup Recommendations: The Assistant Administrator (AA) for Water (as the AA for the National American Indian Program) and the Office of General Counsel (OGC) should jointly issue a memorandum providing guidance and establishing docketing procedures specific to the compilation and maintenance of administrative records for EPA determinations on tribal applications for eligibility to run regulatory programs under all relevant EPA statutes. The memorandum should also ask Regions to establish a training program to ensure that the guidance and procedures are followed.

Adoption and Implementation: We adopt this recommendation in full. The final guidance is attached as Attachment B.

Issue 2 - - HQ Role: "What concurrence/consultation role should HQ play in EPA decisions regarding tribal eligibility to run regulatory programs?

Workgroup Recommendation: HQ review and concurrence should be required for all nationally-significant matters. Decisions on national significance should be guided by semi-annual review and consultation meetings between HQ offices (the American Indian Environmental Office (AIEO), OGC,

and the national program manager (NPM offices) and Regions to discuss national concerns/issues and to provide Regions the opportunity to discuss potential upcoming tribal actions/cases.[3] In all cases, regional-HQ consultation should begin as early as possible, particularly prior to a tribe's application where regional staff believe, based on early involvement with the tribe, that nationally-significant issues may be raised by an application. In addition, to help inform decisions on national significance, Regions should be asked to provide a brief memorandum to HQ assessing the national significance of each tribal application for a regulatory program as applications come into the Region. HQ should be ultimately responsible for determining national significance.

The determination regarding national significance should be made within 30 days of EPA receipt of a tribal application. On applications with nationally-

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[3]The Workgroup recommended that there be one meeting involving all Regions and one Region-specific meeting each year. In addition, the Workgroup recommended that existing procedures (e.g., the National Indian Workgroup) be used to improve coordination. Although the scope of the Workgroup's analysis was limited to EPA determinations on tribal eligibility applications for regulatory programs, the Workgroup noted that other pending or possible future Agency actions affecting environmental programs in Indian county (e.g., PSD redesignations, site-specific rulemaking under RCRA) can and should be discussed in these semi-annual meetings.

significant issues, an expectation should be established that HQ will concur or provide specific guidance to the Region within 30 days after a Region's tentative decision has been provided to HQ, provided there has been early involvement for HQ. Regions should ensure that a tribe that has applied for eligibility is kept informed of the status of the decision-making process. The process described above should be reevaluated after 3 years.

AIEO, OGC and the relevant national program office are the appropriate HQ offices to be involved in the consultation and concurrence process.

Finally, Regions should have periodic "Round table" discussions with their tribes. Regional Counsel attorneys should have early consultation with tribal attorneys to identify potential legal issues pertaining to tribal eligibility for regulatory programs.

Adoption and Implementation: We adopt this recommendation in full. Appropriate changes to the Agency's delegations manual will need to be made to implement the HQ concurrence aspects of this recommendation. Bob Perciasepe is initiating appropriate delegations manual changes for office of Water programs. We have asked the Assistant Administrators for the Office of Prevention, Pesticides, and Toxic Substances and the Office of Air and Radiation to initiate appropriate changes to the delegations manual for their programs. We ask that AIEO consult with those offices and report to us on the status of these delegations manual changes in one month. We ask that regional and HQ

offices implement all other aspects of the recommendations outlined above.

We emphasize that the consultation and concurrence process should operate as efficiently as possible. It is essential that HQ and Regions consult early in the process, even before tribal applications are submitted whenever possible. We will reevaluate this process, with input from Regions, NPMs, AIEO and tribes, after three years.

Issue 3 - - Application of the Montana test.

Issue 3a - - Should EPA prepare guidance on applying the Montana impacts test (regarding tribal authority over nonmembers on fee lands within reservations)?

Workgroup Recommendation: The AA for Water, (as the AA for the National American Indian Program) and OGC should jointly issue general guidance to EPA regional staff, and request that AIEO work with OGC and the Regions to develop and initiate a training program to supplement the guidance. The training should be conducted in Regions with nonmember fee lands and should allow for discussion of the application of the Montana test and the development of decision documents. Such training should be required for all persons developing decision documents that include an analysis under the Montana test. For all other persons involved in the Indian Program, the training should be encouraged. Finally, Regions should be ready to work with tribes that request assistance in preparing applications involving Montana test issues.

Adoption and Implementation: We adopt this recommendation in full. The final guidance is attached as Attachment C. We ask that AIEO work with OGC and the Regions to develop a training program as discussed above.

Issue 3b - - Generalized Findings. Should EPA publish a set of generalized findings, to supplement reservation-specific findings, regarding the nature of the pollutants and activities regulated under the environmental statutes and the importance of effective regulation under those statutes?

Recommendation: the Agency should issue in the Federal Register an appropriate set of generalized findings for all relevant programs regarding the seriousness and mobility of pollutants and the importance of environmental regulation to tribal self-governance.

Adoption and Implementation: We adopt this recommendation in full and ask that AIEO and the relevant NPMs in the Office of Water and the Office of Prevention, Pesticides, and Toxic Substances, in consultation with OGC and the Regions, prepare in a timely manner appropriate generalized findings consistent with the Workgroup's recommendation.

Issue 4 - - Stakeholder Involvement: Who are the appropriate entities to comment on tribal water quality standards (WQS) eligibility applications? Should opportunity for comment be provided on supplemental application materials or tentative determinations? This issue is

limited to opportunity for comment on a tribe's assertion of jurisdiction.

Recommendation: The current process for review of tribal eligibility to set WQS provides "appropriate governmental entities" (i.e., adjacent states, tribes, and federal agencies) an opportunity to comment on tribal assertions of jurisdiction contained in the initial application from a tribe. In addition, under the current process, notice of availability of a tribal application is provided to other potential commenters, specifying that any comments are to be funneled through "appropriate governmental entities." The Workgroup recommends that EPA supplement this current process by also providing: 1) supplemental application materials to "appropriate governmental entities," 2) a 30-day opportunity for these governments to comment on EPA's proposed findings of fact (under the Montana test) where a tribe seeks program approval over nonmembers on fee lands, and 3) notice of availability of such proposed findings of fact to other potential commenters (with comments to go through "appropriate governmental entities"). The Agency should also ensure that applicant tribes have an opportunity to review EPA's draft proposed findings of fact (under the Montana test) before they are made available to "appropriate governmental entities." EPA should also provide tribes an opportunity to respond to any comments submitted by "appropriate governmental entities."

In addition, EPA should ensure that tribes are given an opportunity to comment on any state application to EPA containing

an assertion of jurisdiction over areas that are in or adjacent to Indian country.

Adoption and Implementation: We adopt this recommendation in full. EPA decisions regarding tribal eligibility to set WQS should proceed consistent with the process detailed above. This expanded process may be implemented without changes to EPA regulations (see 40 C.F.R. § 131.8). Nonetheless, the Office of Science and Technology within the Office of Water, in consultation with AIEO, the Regions and OGC, should explore whether it is advisable for the Agency to incorporate this expanded process into regulation.

Issue 5 - - Eligibility requirements for grants: Ensuring consistent and adequate documentation regarding tribal eligibility for grants (i.e., evaluation of "treatment in the same manner as a state" (TAS) criteria - federal recognition, substantial duties, jurisdiction, and capability).

Recommendation: EPA should prepare guidance for EPA staff on the TAS considerations unique to grants. The guidance should address issues such as: the jurisdictional component of grant eligibility decisions; tribal authority issues relating to CWA § 319(h) grants; the "reservation" requirement under the CWA; use of CWA § 106 funds for off-reservation activities that relate to the protection of waters within reservations; the capability component of grant eligibility decisions; procedures for documenting eligibility determinations for grants; and internal Agency concurrences required for grant eligibility decisions. The Agency should ensure that appropriate

grant and program offices receive copies of the guidance.

Adoption and Implementation: We adopt this recommendation in full and ask that AIEO and the Office of Administration and Resources Management, in consultation with OGC and the Regions, prepare in a timely manner guidance consistent with the Workgroup's recommendation.

Conclusion

We would like to thank all the members of the Workgroup for dedicating so much of their time and energy to reviewing the Agency's process for making tribal eligibility determinations and developing the recommendations and the guidance for improving this process. Also, we would like to thank the Tribal Caucus of the TOC for taking the time to review thoroughly the draft recommendations and for providing the Workgroup with detailed comments. We believe that the recommended changes in the Agency's process, the proposed training programs, and the new guidance will improve the Agency's decision-making process for tribal applications for eligibility to run regulatory programs.

If you have any questions regarding this memorandum, please contact Robert Dreher (202-260-8064) or have your staff contact Tony Hanson (202-260-8106) or Jim Havard (202-260-1003).

Attachments

cc: Senior Indian Managers
Associate General Counsels

Regional Counsels
Tribal Eligibility Workgroup Members
National Indian Workgroup Members
EPA Indian Law Workgroup Members

ATTACHMENT C

MONTANA-TEST GUIDANCE

Making Factual Determinations Under the Montana Test: Tribal Civil Regulatory Authority Over Nonmember Activities on Fee Lands

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NOTICE

The following guidance is intended only for EPA managers and staff in the analysis of tribal assertions of civil regulatory jurisdiction over nonmember activities on fee lands within a tribe's reservation. Specifically, the guidance is intended to assist in the collection and analysis of factual information related to the question of whether or not the activities of nonmembers on reservation fee lands may have serious and substantial effects on the "political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 (1981). Because of the importance of EPA's determinations in this area, it is very important that all readily-obtainable factual information be available to EPA managers in order to make properly-informed decisions.

The following guidance should be viewed as offering suggestions only. The guidance is based upon the experience of the Agency to date and offers suggestions on questions to ask and various types of information

> that, if available, may be helpful to the Agency in making jurisdictional determinations. The guidance does not establish any requirements. In particular, it does not establish any requirement that any specific information or category of information listed here is necessary in order to determine that nonmember activities either do or do not have the impacts on the tribe necessary to warrant tribal regulation of those activities. The determination of the sufficiency of information is a matter of the expert and professional judgment of the decision-maker based on the facts of the particular application, and cannot be reduced to guidance of this nature.

Background

In their applications for eligibility to implement a number of EPA programs, tribes must demonstrate that they have sufficient jurisdiction to enforce tribal laws over the areas covered in the application, including, where appropriate, civil regulatory jurisdiction over nonmember activities that may occur on any nonmember-owned fee lands located on a tribe's reservation. The Supreme Court has set forth a legal test for determining whether a tribe has set forth a legal test for determining whether a tribe has jurisdiction over nonmember activities on fee lands, called the "Montana Test."

> The Montana Test establishes that a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when

> that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 (1981).

In 1991, EPA decided that it would apply a more rigorous formulation of the Montana Test by establishing an "operating rule" that requires tribes seeking eligibility to set water quality standards governing the activities of nonmembers on fee lands to show that the effects are "serious and substantial."[4] At the same time, EPA published its finding that the behaviors regulated under the Clean Water Act (CWA) tend to have serious and substantial effects on human health and welfare (and, thus, the CWA regulates them). EPA also announced that it would require tribes seeking eligibility to set

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[4] EPA noted in 1991 that "[t]he choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard per se." Since 1991, however, the Supreme Court has reaffirmed Montana's impacts test in 1993 (Bourland) and again in 1997 (Strate), both times quoting the Montana impacts test verbatim without addressing the need for "serious" or "substantial" impacts. While it appears that the Montana Test does not require "serious and substantial" impacts, for the time being, as a matter of prudence, EPA will continue to look to see whether such impacts exist when evaluating tribal authority under the Montana Test.

water quality standards governing the activities of nonmembers on fee lands to provide facts, on a case-by-case basis, demonstrating that water pollution from nonmember fee land sources has or may have serious and substantial effects on the health or welfare of tribal members under the particular conditions of the tribe's reservation.

The Agency now has several years of experience in reviewing tribal applications for EPA problems that involve an assertion of tribal jurisdiction over nonmember activities on fee lands. The Agency's experience shows that it is important for the Agency to be consistent in its application of the Montana Test. To help ensure national consistency in the Agency's process for making determinations under the Montana Test, the following factors should be considered.

Guidance

What types or categories of facts may be relevant to a determination of whether pollution generated on nonmember fee lands may have a deleterious effect on tribal health or welfare or the tribe's political integrity or economic security? The following questions should be considered:

(1) Is pollution being produced on nonmember fee lands, or may it be/is it likely to be produced? Are there facts showing that pollution is presently being produced on nonmember fee lands within the reservation? If no pollution is

presently being produced, are there circumstances showing that new pollution sources may be established in the future that may have impacts on tribal health, welfare, political integrity, or economic security? The threat of such impacts is a reasonable basis for a tribal government to establish controls intended to prevent harm from occurring in the first place. Thus, any information regarding present or potential pollution sources on nonmember fee lands should be considered.

(2) Are tribal members or resources exposed, or may they be/are they likely to be exposed to the pollution? Are there facts showing, not only that pollution is occurring or may occur, but that tribal members may be exposed to the pollution? For example, such exposure can occur if pollution is carried from nonmember lands due to the ambient nature of air and water. Tribal members may be exposed to the pollution when they are on nonmember fee lands. Pollution can also be carried through the food chain or drinking water supplies. Any facts relating to the means by which tribal members are or might be exposed to pollution should be considered. Are there facts showing that resources upon which tribal members depend (e.g., air, water, plants and

animals) are or may be exposed to pollution?

(3) Does the exposure to the pollutants affect or have the potential to affect tribal politics, economics, health or welfare? Are there facts or studies supporting a showing that, if exposed to the pollutants generated on nonmember fee lands, tribal members may suffer deleterious effects on their "political integrity, economic security or health or welfare?" Effects on "political integrity" and "economic security" may occur when tribal members, or species or resources on which tribal members depend, are exposed. For example, the tribe may depend economically upon the consumption or commercial sale of fish, and protection of the fish resource depends upon effective protection of the resource habitat. Are the impacts to tribal members serious and substantial?

B. Do the facts relating to a Montana Test analysis differ from program to program or under different environmental statutes? Yes. Again, the purpose of this guidance is simply to suggest questions to ask and possible areas to investigate to ensure that as many of the relevant facts are before the EPA decision-maker as are reasonably available. The types of pollutants may vary from program to program. Similarly, the

route of exposure often may vary from program to program.

C. How detailed should the Montana Test analysis be? Any factual data readily available to the tribes, EPA and any other commenters, such as state or local governments, businesses and private citizens, might be considered. One approach would be to use the information provided in the tribal application, and information provided by external commenters and by an EPA review of the literature and relevant information in Agency files. In order to base Montana-Test decisions on as much relevant information as is reasonably available, Agency staff should do the best job that can reasonably be done in thoroughly substantiating their recommendations with available facts and studies. A "best reasonable effort" would not ordinarily require EPA Regions to carry out or contract for original research.

D. Should Montana-Test determinations address how regulation of nonmember water-polluting activities is necessary to effective tribal "self-governance?" This issue arises as a result of a discussion of impacts on self-government by the Supreme Court in it's 1997 decision in Strate v. A-1 Contractors. The Agency determined in its 1984 EPA Indian Policy that "the principle of Indian self-government" appropriately includes such governmental functions as "setting standards, making environmental policy decisions

and . . . carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace." The tribal governments' views on this issue are particularly important. It will greatly assist the Agency in making Montana-Test determinations if the applicant tribal government would also give its reasoning and basis (including any supporting facts) for concluding that effective self-government includes enabling the tribe to carry out the program for which it is applying.

E. Should EPA consider a tribe's treaty rights or other similar rights embodied in statutes or executive orders in making its determinations? The applicant tribe may have signed a treaty with the United States in which the United States has guaranteed rights that are clearly tied to tribal politics, economics, health or welfare. While this information does not in and of itself demonstrate that nonmember activities may impact the tribal interests recognized in the Montana Test, it may be relevant to the analysis of whether there are impacts that are serious and substantial and a threat to effective self-government.

F. At what point should Regional management and staff seek input and advice from Headquarters in making Montana Test determinations? National Program Offices, the Office of General Counsel and the American Indian Environmental Office can all

provide important assistance and advice, based upon the Agency's experience in addressing the issues encountered in evaluating tribal assertions of civil regulatory authority over nonmember activities. This body of Agency experience is constantly growing, and informed by new federal court decisions applying the Montana Test. In order to benefit from the most current and relevant information, Regions should coordinate closely with Headquarters' offices and seek Headquarters concurrence on applications raising nationally-significant issues. This coordination should begin as early in the process as possible, such as upon notice that a tribe is interested in pursuing regulatory authority over nonmembers on fee lands, and no later than when individual tribal applications are received in the Regional Office.

INDIAN RESERVATIONS IN WISCONSIN

Source: DNR-AM 9/10/96

MOTION FILED
JUL 29 1998

No. 97-1929

In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF MONTANA ASSOCIATION OF COUNTIES (MACO) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE TRIBE POSSESSES THE INHERENT SOVEREIGN AUTHORITY TO REGULATE FEE PROPERTY OWNED BY NONMEMBERS UNDER THE CLEAN WATER ACT?

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF BY MONTANA ASSOCIATION OF COUNTIES (MACO) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Comes now the Montana Association of Counties (hereinafter MACO) and respectfully moves this Court for leave to file an Amicus Curiae brief in support of Petitioner's Petition for Writ of Certiorari.[1] MACO makes the aforementioned Motion pursuant to Rule 37 of the United States Supreme Court Rules.

MACO represents all of the Counties of Montana. Montana has seven federally recognized Reservations within its boundaries. At least 20 of the 56 Counties in Montana either border a Reservation or have property lying within a Reservation.

Lake County currently holds a membership in MACO. Approximately three-fourths of Lake County consists of the Salish Kootenai Reservation. The Reservation also lies in parts of Missoula, Flathead and Sanders Counties. All of these Counties hold a membership in MACO.

The issue presented in this case directly impacts twenty of the member Counties of MACO. The issue of

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[1] The Environmental Protection Agency has consented to the filing of this brief. The Confederated Salish Kootenai Tribes have not consented to the filing of this brief necessitating a motion pursuant to Rule 37 of the Supreme Court Rules. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

water regulation effects the services provided by these member Counties, their property and the citizens of the member Counties.

MACO is familiar with issues in Indian Law. MACO recently sponsored an Amicus Curiae Brief in the case *South Dakota v. Yankton Sioux Tribe*, ___ U.S.___, 118 S.Ct. 1381 (1998). MACO sponsored an Amicus Curiae Brief in the case at hand before the Ninth Circuit Court of Appeals.

Because this case directly effects the member counties of MACO, and because of MACO's familiarity with the principles of Indian law, MACO believes it can provide a fresh outlook and argument that will assist this Court in its decision.

Counsel for MACO has contacted counsel for the United States Environmental Protection Agency, the United States Attorney, Sherry Scheel Matteucci, and she has not consented to MACO's filing of this brief.

Counsel for MACO also contacted counsel for the Confederated Salish and Kootenai Tribes. The Confederated Salish and Kootenai Tribes declined their consent.

Dated this 29th day of June, 1998.

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INTEREST OF THE AMICI MONTANA ASSOCIATION OF COUNTIES

The Montana Association of Counties (hereinafter MACO) represents all fifty-six Counties in Montana including Lake County. Twenty of these Counties either border or have part of their territory lying within one of the seven Reservations in Montana. The Ninth Circuit decision directly impacts twenty of MACO's members. These twenty members provide a substantial majority of the services to their citizens, both Tribal members and nonmembers. Unless reviewed and overturned, Tribal regulation will force these twenty members to allocate sparse tax dollars in order to comply with Tribal water quality standards. As a representative of these twenty members, MACO has a duty to voice their interests and concerns.

STATEMENT OF THE CASE

Amici curiae adopts the Statement of the Case set forth in the Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This Court should grant a Writ of Certiorari when the Ninth Circuit erred in finding the Tribe possesses the inherent sovereign authority to regulate Montana, local governments and their nonmember citizens under the Clean Water Act (hereinafter CWA). The Ninth Circuit impermissibly found the second exception of *Montana v.*

United States, 450 U.S. 544 (1981), circumvented the general rule. The Ninth Circuit ignored this Court's instruction requiring the second exception to trigger only when the Tribal regulation of nonmembers bears a clear relationship to tribal self-government or its internal relations. State regulation of nonmembers on fee land will prevent any impact to the Tribe's ability to govern its members and trust land. State regulation will prevent nonmembers from invading the internal relations of the Tribe.

As presently construed by the EPA, the CWA empowers the Tribe to designate water uses for all waters on the reservation, and to set Water Quality Standards (hereinafter WQS) to achieve the designated uses. The Tribe must certify any permit issued by the EPA, insuring that it meets tribal WQS. Challengers to tribal use designations, WQS, or denials of certification must initiate actions in Tribal court using Tribal law.

Local governments provide the essential services to the entire populace of the Reservation. These governments have a strong interest in regulating the services they provide. Under the EPA's approach, the local governments will have no voice in the regulation of these services.

Nonmembers are subject to laws and courts and a legislative body they have no role in selecting or defining. Sovereign immunity and no constitutional rights in Tribal court, make the EPA's approach unsuitable for nonmembers.

Finally, this Court should grant certiorari when the principle of sovereign immunity causes unworkable enforcement of the CWA. Both the Tribe and the State

possess sovereign immunity from suit in each other's court. The Tribe cannot enforce its regulations against State and local governments in Tribal Court. State and local governments cannot challenge a Tribal decision under the CWA without foregoing their sovereign immunity. Such hurdles require review by this Court.

I. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI WHEN THE NINTH CIRCUIT ERRED IN FINDING AN INDIAN TRIBE POSSESSES THE INHERENT SOVEREIGN AUTHORITY TO REGULATE STATE OR LOCAL GOVERNMENTS AND THEIR CITIZENS.

The Ninth Circuit Court of Appeals upheld a determination by the EPA permitting Indian Tribes to regulate fee property owned by state and local governments and their nonmember citizens. *Montana v. United States Environmental Protection Agency*, 137 F.3d 1135 (9th Cir. 1998). The EPA made this decision by giving lip service to the *Montana v. United States, supra,* general rule. The EPA permitted the second exception fueled by its generalized findings to circumvent the general rule. A Tribe need only assert the following three phrases:

> 1) there are waters within the reservation used by the tribe; 2) the waters and critical habitat are subject to protection under CWA; and 3) impairment of waters **would have a serious and substantial effect on the health and welfare of the tribe.**

Id. at 1139. By saying these magic words, Tribes may regulate all fee land owned by the State, local governments, and nonmembers within a reservation. With the

magic words, the Ninth Circuit subjected nonconsenting State and local governments and their nonmember citizens to regulation by a foreign nation utilizing their rules. This Court should issue a Writ of Certiorari because the Ninth Circuit erred in its interpretation of the *Montana, supra,* test. Without any factual basis, the Ninth Circuit permitted the second exception to *Montana, supra,* to completely circumvent the general rule.

This Court should also issue a Writ of Certiorari, when the local governments and their nonmember citizens must immediately face tribal regulation. If this Court fails to issue a Writ, the governmental entities, the service providers, must invest money and time in order to comply with the new tribal regulations until this Court finally decides the extent of the second exception of *Montana, supra.*

A. THE NINTH CIRCUIT ERRED WHEN IT CIRCUMVENTED THE GENERAL RULE IN *MONTANA* WITH THE SECOND EXCEPTION.

In *Montana v. United States, supra,* this Court found as a general rule that the inherent sovereign powers of an Indian Tribe do not extend to the activities of nonmembers. *Montana v. United States, supra,* and *Strate v. A-1 Contractors,* 117 S.Ct. 1404, 1409 (1997). The general rule means a tribe "has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." Plurality of White, Rehnquist, Scalia and Kennedy *Brendale v. Confederated Tribes and Bands of the Yakima Nation,* 492 U.S. 408, 430 (1989). Of course, the *Montana* court qualified the rule by stating:

> [1] To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe of its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee*, 358 U.S. 217, 233 (1959). [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, supra, at 565-566.

In construing the second exception, *Strate,* stated:

> Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations."

Strate, supra, at 1416 quoting *Montana, supra,* at 564. The Tribal regulation over nonmembers must bear a clear relationship to tribal self-government or its internal relations. *Montana, supra,* at 564-565.

In "reality", Tribes lack any inherent sovereignty to regulate nonmembers after *Montana, supra. South Dakota v. Bourland,* 508 U.S. 679, 695 n. 15 (1993). In the event

nonmember activities on fee land threaten the political integrity, economic security or health or welfare of the Tribe, the Tribe must bring an action under federal law and not in Tribal Court. *Brendale, supra,* 430-431. The Supremacy clause requires the state and local governments to recognize and respect the Tribe's interests and regulate activities accordingly. Id. at 431.

Montana, Brendale, Bourland, and *Strate, supra,* demand a narrow reading of the second exception limiting its application to activities that seriously threaten tribal self-governance, its own members, or the Tribe's internal relations. Under such a threat an aggrieved party must bring the action under federal law outside of the Tribal courts. The Ninth Circuit ignored the instructions of this Court and refused to examine water regulation to see if the State and local governments have allowed the activities of nonmembers to threaten Tribal self governance or the internal relations of the Tribe.

If the Ninth Circuit had reviewed this case properly the Court would have discovered that the State of Montana has traditionally regulated nonmember fee land including water. Montana possesses an intricate regulatory system to protect the water quality of all waters within the State of Montana. See Mont. Code Ann. Section 75-5-101 (1997) et seq.[2] The Montana Constitution

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[2] The Montana legislature stated:

> It is the public policy of this state to: (1) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses; (2) provide a comprehensive program for the prevention,

provides every citizen with "the right to a clean and healthful environment." Mont. Const. of 1972, Art. II, Section 3 (1972). The Montana Legislature has a constitutional duty to prevent degradation of Montana's natural resources. Mont. Const. of 1972, Art. IX, Section 1 (1972).

State regulation of nonmember fee land does not prevent Tribal regulation of trust land and of Tribal members. The Tribe may freely pass laws to regulate all water on trust land and on land owned by Tribal members.

State regulation of nonmembers does not impermissibly invade in the internal relations of the Tribe. The *Montana, supra,* Court did not find state regulation to be intrusive on the internal relations of the Tribe. State regulation of water on nonmember fee land does not permeate the internal relations of a Tribe any more than State regulation of nonmember hunting and fishing.

Under State regulation, nonmember activities involving water use will not impact the Tribe's self-governance or their internal relations. Montana's water quality regulations provide severe civil and criminal penalties which will insure compliance with Montana's policy of nondegradation.[3]

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abatement, and control of water pollution. Mont. Code Ann. Section 75-5-101 (1997).

[3] The Montana Department of Environmental Quality has the authority to issue a penalty against a violator equal to $10,000 for each day of each violation with the maximum penalty not to exceed $100,000. Mont. Code Ann Section 75-5-611(9) (1997). A violation may also result in a criminal fine of /$25,000 per day of violation and up to one year imprisonment for the first offense. Mont. Code Ann Section 75-5-632 (1997).

The EPA and the Ninth Circuit erred in failing to examine State water quality regulation in light of its impact on Tribal self-governance or Tribal internal relations. Instead, the Ninth Circuit and the EPA examined the issue in a state regulation vacuum. Without any analysis, the EPA declared and the Ninth Circuit affirmed that nonmember activity threatens the health or welfare of the Tribe. Such analysis ignores the reality of current State regulation. Nonmember activity does not threaten the self-governance or internal relations of the Tribe. State regulation currently addresses all threatening activities cited by Respondents. Because the State regulation of nonmember fee land will prevent any impact to the Tribe, the second exception to *Montana, supra,* does not apply. The Tribe lacks the inherent sovereignty to regulate nonmember fee land.

The appropriate construction of the *Montana, supra,* exception stands as the keystone to jurisdictional Indian Law. The Ninth Circuit misapplied the second exception to the circumvention of the general rule. This Court should issue its Writ of Certiorari and reverse the Ninth Circuit.

B. UNLESS REVIEWED TRIBAL REGULATION UNDER THE CWA LEAVES LOCAL GOVERNMENTS AND THEIR CITIZENS IN UNCERTAINTY.

Congress passed the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by the reduction and eventual elimination of polluting discharges. 33 U.S.C. § 1251(a). CWA

attempts to accomplish its goal by developing a partnership between the federal government and the States. 33 U.S.C. Section 1251(b).

Congress amended the CWA in 1987 with the Water Quality Act of 1987 (hereinafter WQA), P.L. 100-4, 101 Stat. 7. For the first time, the WQA permitted the treatment of Indian Tribes in the same manner as states for certain purposes. CWA Section 518, 33 U.S.C. Section 1377. 59 Fed. Reg. 64, 339 (Dec. 14, 1994). A Tribe that meets the criteria in Section 518(e), 33 U.S.C. § 1377(e) and 40 C.F.R. Section 131.8(a), may submit an application to the EPA. 40 C.F.R. Section 131.8 (1992).

If the EPA recognizes a Tribe as a State, a Tribe can submit its proposed water quality standards to EPA. *City of Albuquerque v. Browner*, 97 F.3d 415, 419 n.4 (10th Cir. 1996). The Tribe must first inventory all of the surface waters within the Reservation. Id. at 6. The Tribe then assigns specific uses to the inventoried waters. Id. Next, the Tribe selects the use classification in order to achieve the Tribe's ideals or desires for the inventoried waters. Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters, 71 North Dakota Law Review 433, 451 (1995). (Hereinafter N.D.L.Rev.) The CWA requires that at a minimum, the Tribe protect "fishable/swimmable " goals. 33 U.S.C. Section 1251(a)(2) (1989). See also EPA WQA Guide.

The Tribe may adopt various use categories and subcategories that the Tribe deems appropriate to the reservation so long as the use categories meet the minimum requirements of the CWA and the purposes of the CWA. EPA WQS Guide at 7. Uses may include typical items like

irrigation and public drinking water supplies, to the less typical items like cultural and religious activities. Tribes may adopt more stringent WQS than the fishable/swimmable goals, however, once adopted, the Tribe cannot downgrade the uses unless the Tribe shows that attainment is not feasible. 40 C.F.R. Section 131.10(g), (h) (1994).

After the Tribe designates its uses, the Tribe must design quality criteria which are designed to protect and attain the designated uses. Id. at Section 131.2. In theory, if polluters comply with the criteria, then the water body should achieve a water quality sufficient to achieve and protect the designated use. 40 C.F.R. Section 131.11(a) (1994).

The Tribe holds a public meeting under tribal law and applicable federal regulations. 33 U.S.C. Section 1313(c)(1) (1988). "EPA urges Tribes to actively involve Tribal members in the review process. Public hearings . . . are an effective means of involving Tribal members in setting goals for their reservation waters . . . " EPA WQS Guide at 13. The Tribe, however, should open the meeting to all persons including non-Indians. 40 C.F.R. Section 131.20(b) (1994).

EPA only reviews a Tribes designated uses and WQS to insure that they are consistent with the CWA and EPA regulations. EPA WQS Guide, *supra,* note 118 at 13. The scientific analysis that formed the WQS must be adequate and the designated uses and criteria must be compatible throughout the water body. Id. at 15. 56 Fed. Reg. 64, 876 & 890 (1991). The CWA and the WQA permits states and Tribes that meet Section 1377(e) standards to set standards that are more stringent than federal standards so as

to force the development of technology. *United States Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir.1977).

EPA will respect a Tribe's decision to adopt WQS more stringent than an adjacent state's WQS for the same water body. See 56 Fed. Reg. 64, 876 & 886 (1991). If the Tribe's WQS pose a conflict with the state's WQS, the EPA will not force a Tribe to lower its WQS. Id. See also *City of Albuquerque v. Browner, supra*, at 423-424. Unless there is a showing of inconsistency with the CWA, neither the EPA nor a state may second-guess a Tribe's value judgment as to the uses of reservation waters and the WQS to achieve those uses. *In re Bethlehem Steel Corp.* 58 Op. of EPA General Counsel 337, 338 (1977). 56 Fed. Reg. 64, 876 & 890 (1991). In fact, EPA does not require judicial review for tribal certification because decisions are based on tribal law and not federal law. 56 Fed. Reg. 64, 876 & 882 (1991).

Once the EPA has approved the tribal uses and WQS as being consistent with the CWA, the EPA and the Army Corp of Engineers may only issue permits to point source dischargers of pollutants if they comply with applicable tribal WQS. 33 U.S.C. Section 1341(a)(1) (1994), 1311(b)(1)(C) (1988). 40 C.F.R. Section 124.51(c) (1994). The Tribe has three options when examining an application: (1) the Tribe certifies that the proposed discharge complies with tribal WQS; (2) the Tribe certifies that the proposed discharge will comply with tribal WQS if the permit incorporates additional conditions; (3) the Tribe denies certification. 33 U.S.C. Section 1341(a)(1) (1988).

The EPA and or Army Corp of Engineers have no power to override the Tribe's determination denying or

conditioning certification. *In re Bethlehem Steel Corp., supra.* 56 Fed. Reg. 64, 876 & 890 (1991). If the Tribe denies certification the federal agency may not issue the permit. Id. The applicant can only challenge the Tribe's denial in tribal court subject to tribal law and their judicial review. Id.

Any conditions placed by the Tribe on a permit become federal permit conditions enforceable by EPA under the CWA. 33 U.S.C. Section 1311(a), 1319(c), & (d) (1988). 40 C.F.R. Section 122.41(a), (a)(2) (1994). CWA violations carry civil penalties of $25,000 per day per violation, criminal penalties of $25,000 per day per violation and or imprisonment for a period of one year, and possible permit revocation or termination. Id. 40 C.F.R. Section 122.41(a) (1994). One commentator has stated:

> The mechanics of the certification process encourage (if not require) the dissatisfied applicant to sue the federal agency who incorporated the tribe's conditions in the federal permit, rather than suing the tribe itself. Such litigation will likely fail on general principles of judicial deference to administrative agencies, but perhaps more importantly from the tribe's perspective, will not directly challenge the tribe's regulatory authority over the applicant, nor the wisdom of the tribe's WQS or its conditions.

71 N.D.L.Rev. 433, 463.

The CWA as defined by the Ninth Circuit's ruling throws local governments and nonmembers into an abyss of uncertainty. The CWA permits Tribes to regulate all waters within the reservation. Waters subject to Tribal regulation include low lying areas periodically inundated

by water. *Conservation Council of North Carolina v. Costanzo*, 398 F.Supp. 653, 673 (E.D.N.C. 1975). The Tribe may regulate man-made ponds and marshes. See *Leslie Salt Co. v. United States*, 896 F.2d 354, 359 (9th Cir. 1990). The CWA also sanctions the regulation of unnamed tributaries that only flow into a traditionally navigable stream during heavy rainfalls. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979).

Unlike the cited cases, the Tribe will designate the wetlands, ponds, and small tributaries subject to regulation. A nonmember can only challenge the designations in Tribal Court subject to Tribal laws.

The Tribe will determine the use of all waters regardless of their location and prior use. Permissible uses may include the protection of culture and religion and other out of the ordinary uses. The Tribe will then set water quality standards in order to meet the uses.

Local governments fear that Tribes may overregulate. The local governments suspect that Tribes may set more stringent WQS than the EPA requirements in order to meet the Tribe's designated uses. In *City of Albuquerque, supra*, the Pueblo Tribe issued arsenic standards 1000 times more stringent than the federal Safe Drinking Water Standard.

> EPA will impose this stringent limit on the City despite the fact that arsenic occurs naturally in Albuquerque's ground water at relatively high levels and is not discharged to the water by industrial polluters. If pure water is discharged at the City's outfall, it is possible that the arsenic levels in water flowing through the Pueblo will remain relatively high. I raise this issue of the

> agency's apparent inconsistency because it is one I find troubling.

City of Albuquerque v. Browner, supra.

The CWA permits Tribes to substantially regulate the activities of nonmembers and local governments. The Tribe may regulate a local government's construction and maintenance of roads, and the construction of bridges. See 33 U.S.C. Section 1344. If the county's bulldozer or road grader causes soil or rock to enter a Tribally defined marsh, then the Tribe may prohibit the construction or maintenance. See *United States v. Lambert*, 915 F.Supp. 797, 802 n. 8 (S.D.W.Va. 1996). See also Id. at 801 n. 7. A Tribe may regulate a private homeowner's landscaping and construction or regulate a farmer's application of fertilizer or herbicides. See *Concerned Residents for Envirn. v. Southview Farm*, 34 F.3d 114, 116 (2nd Cir. 1994). Under the Ninth Circuit's interpretation, the Tribe will regulate all activities using Tribal law in Tribal Court.

Unless this Court reviews this case, the Tribal standards will force local governments to comply with the WQS. Reality dictates that the local governments provide the necessary services to all citizens, Tribal members and nonmembers alike. These services include waste facilities and public water works. Local governments build and maintain roads including the construction of bridges over the waters. These governments must also maintain a welfare department, fund Courts, pay for a county attorney, and several other services. High standards will drive local governments to either increase taxation or reallocate sparse tax dollars from essential services in order to

construct the infrastructure necessary to comply.[4] If this Court later reviews this issue and finds Tribes cannot regulate nonmember fee land, then the local governments will have diverted and wasted substantial tax dollars.

These governments hold a strong interest in regulating the services they provide or having a voice in their regulation. After the Ninth Circuit's decision, the local governments will have no voice in the regulation of any service that impacts Tribally defined water. Despite the fact that Tribal members are citizens of the counties and cities within the reservation and can vote in all elections, nonmembers cannot participate in Tribal politics. The Tribe has the power to cease the construction of bridges and roads, and to close water plants, waste facilities and industries. Despite this power, neither the local governments nor their nonmember citizens can vote to determine the Tribal decision-makers.

Local governments and nonmembers only have a peripheral opportunity to participate. Nonmembers may participate in a public hearing designed for Tribal members under Tribal law. See EPA WQS Guide at 13. This participation has no meaning. The Tribal decision makers

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[4] Albuquerque estimated that it would initially spend $248 million dollars and $26 million annually to comply with the Isleta Pueblo arsenic WQS. The City estimated an additional spending of $70-$100 million for the nitrogen WQS and $60 million to comply with the ammonia WQS. City of Albuquerque's Memorandum in Support of Motion for Summary Judgment at 10-19. *City of Albuquerque v. Browner*, 865 F.Supp. 733 (D.N.M.1993). The City, the Tribe and the EPA have entered an agreement which has delayed the city's compliance. 7 Duke Envtl. L. & Pol'y F.367 (1997) at 13.

must only answer to their Tribal constituents. If Tribal decision makers submit Tribal water quality standards that eliminate an essential service, the Tribal leader need not worry. The Tribal leader stands accountable only to the members of the Tribe.

If the Tribe denies a nonmember their Constitutional rights when reviewing a water matter in Tribal Court, then the nonmember must pursue the denial in Tribal Court under the Indian Civil Rights Act (hereinafter ICRA). 25 U.S.C. Section 1301 et seq.[5] ICRA does not provide a nonmember with the right to a jury of his or her peers. Thus, in all Montana Reservations, a Tribal jury consists of only tribal members. If a nonmember suffers damages, a suit under ICRA may be valueless. The Tribe possesses sovereign immunity. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

Local governments and nonmembers with fee property, nervously await this Court's decision. The local governments cannot afford to be patient. The decision of this Court will determine the future financial allocations and taxation of the local governments. Immediate review by this Court will at least alleviate some of the uncertainty.

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[5] See *Talton v. Mayes*, 163 U.S. 376, 384 (1896), finding Tribal governments including Tribal Courts are not subject to the United States Constitution. See also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 61 (1978), holding the Indian Civil Rights Act did not create a federal remedy in a addition to the habeas corpus remedy.

II. THE SOVEREIGN IMMUNITY OF STATE AND LOCAL GOVERNMENTS GENERATE UNWORKABLE RESULTS REQUIRING REVIEW.

In *Montana v. Gilham*, 127 F.3d 897 (9th Cir. 1997) the Court found the principle of sovereign immunity prevented an individual from suing a State in Tribal Court. The Court stated, "It is consistent with the recognition of sovereignty that both tribes and States are immune from unconsented tort actions by individuals in each other's courts." Id. at 904. The Ninth Circuit previously held that absent an act of Congress, consent or waiver, a Tribe may not sue a State in federal court. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1057 (9th Cir. 1997). The state's sovereign immunity extends to its subdivisions including County and in some cases City governments. See *Toombs County v. O'Neal*, 330 S.E.2d 95, 96-97 (Ga.1985). See also *Comm'l Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1015 (Fla.1979). 57 Am.Jur.2d Section 6 (1988).

In this case, the CWA poses a serious problem to any enforcement. Any conflict between a State and a Tribe cannot be resolved without one of the two governments foregoing its sovereign immunity. *Gilham, supra*, 900.

Under the Ninth Circuit's ruling, the Tribe cannot enforce its own regulations against the State, Lake County, or cities and towns. The principle of sovereign immunity prohibits the Tribe from enforcing its water regulations in Tribal Court. Instead, the Tribe must seek shelter under the enforcement wings of the EPA. Relying upon the bureaucratic channels of the EPA diminishes the Tribe's ability to enforce its WQS. Every violation will

require subsequent bureaucratic interpretations before the enforcement mechanism begins. The entire process could lead to a bureaucratic nightmare.

A state or local government cannot challenge in Tribal Court a Tribe's WQS, use designation, or any other decision made under the CWA without foregoing its sovereign immunity. Each time the State or local government considers a challenge to the Tribe, it must weigh the challenge against waiving its sovereign immunity. Such a dilemma strangles the State and local governments' right to participate and infringes upon the traditional notions of Due Process.

Sovereign immunity creates confusion for all entities involved in the Ninth Circuit's decision. This Court should grant Certiorari to resolve the unworkable result.

CONCLUSION

This Court should grant a Writ of Certiorari when the Ninth Circuit erred finding the Tribe possessed the inherent sovereignty to regulate nonmember owned fee land under the CWA. The construction of *Montana, supra,* and its exceptions lies at the nucleus of modern Federal Indian law. The Ninth Circuit ignored this Court's instructions and circumvented the general rule by failing to read the second exception in the context of Tribal self-government and the internal relations of a Tribe.

This Court should also review this case in light of the serious impact Tribal water regulation will have on local

governments and their nonmember citizens. Local governments provide the majority of the services. Unless reviewed, Tribal regulation will force the allocation of local tax dollars toward constructing the infrastructure to comply with the CWA. Local governments fear over-regulation from an entity where they have no voice.

Finally, the principle of sovereign immunity yields an unworkable result under the CWA. The Tribe cannot enforce its regulations against the State and local governments in Tribal Court. The State and local governments cannot challenge a Tribal decision under the CWA without foregoing their sovereign immunity. For these reasons, this Court should grant a Writ of Certiorari.

Respectfully submitted,

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MOTION FILED

AUG 2 4 1998

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No. 97-1929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF NATIONAL WATER RESOURCES ASSOCIATION, FLATHEAD JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION AND JOCKO VALLEY IRRIGATION DISTRICTS, ROSS MIDDLEMIST, WILLIAM SLACK, AND GLEN MURPHY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The National Water Resources Association ("NWRA"), the Flathead Joint Board of Control of the Flathead, Mission, and Jocko Valley Irrigation Districts ("Districts"), Ross Middlemist, William Slack, and Glenn Murphy respectfully move this Court, pursuant to Rule 37 S.Ct. R., for leave to file an *Amicus Curiae* brief in support of Petitioner's Petition for Writ of Certiorari.

The named individuals and the Districts participated in this matter below as *amici*.[1] They attempted to par-

[1] Mr. Wayne Maughan, who participated below, does not request leave to participate here because he has sold his property and moved away from the Flathead reservation.

ticipate as parties, moving the district court for leave to intervene, which it denied. *State of Montana v. U.S. Environmental Protection Agency*, 941 F.Supp. 945, 954-55 (D. Mont. 1996). The individuals own land in fee within the exterior boundaries of the Flathead Reservation in Montana, where they live with their families. They are not members of the Confederated Salish and Kootenai Tribes ("Tribes"), but they and their families consume and use water, just as tribal members do.

Their interest in this litigation lies in the fact that their health and welfare, no less than tribal members' is affected by the quality of water on the reservation and their use of water is affected by the water quality standards applicable to the reservation. If the Tribes have the authority to set these standards, the individuals, as non-members, will have no right to participate in the political process that leads to these standards. In addition, the precedential effect of the lower court's decision will undoubtedly affect other jurisdictional issues, such as whether the Tribes have authority over wetlands and water rights. Each of the individuals own both wetlands and water rights.

Congress authorized the Districts to be formed and operated on the reservation under the laws of Montana. It authorized them to embrace within their boundaries and authorities all fee-owned irrigable lands, including trust allotments once the fee patent has issued. As owners of irrigable land, each of the individual *amici* is a constituent of one of the three Districts. Under Montana law, the Districts' authority includes, *inter alia*, the power to construct and maintain dams and reservoirs and other diversions for irrigation works [2], appropriate water, acquire

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[2] The Court found diversions of water, even for nonconsumptive uses, could be limited because of their impact on water quality standards in *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994).

land, water rights, and water works, enter contracts with the United States, apportion and distribute irrigation water among irrigators, and operate the irrigation project which serves them. *See* Ch. 85, Title 7, Part 19, Montana Code Annotated (1997). The Flathead Joint Board of Control serves as a central operating authority for these Districts and, like the Districts, is a governmental entity under Montana law. § 85-7-1905, MCA.

As local governmental entities of the State the Districts are concerned to prevent the disruption of the direct political relationship, and accountability, between their constituents, the Districts, and the State by the intrusion into this relationship of the Tribal governments' authority.

NWRA is a not-for-profit federation of water resource organizations in sixteen (16) of the seventeen (17) reclamation states. Its membership includes rural water districts, municipal water entities, and other local governments. Many of these members are Publicly Owned Treatment Works ("POTWs"), which receive wastewater from indirect dischargers, treat it, and then discharge it into navigable waters. Consequently, they must meet applicable water quality standards to receive the certification required under § 401 of the CWA. Some of its members are commercial water supply companies and legal and financial institutions concerned with permitting and financing water supply and treatment facilities. Among its members are municipal water supply and waste water treatment agencies, POTWs, and rural water districts located on Indian reservations throughout the West.

NWRA serves its membership by advocating for laws, regulations and policies which promote the efficient use of water in the West. The development of policies and projects to meet future needs requires a degree of certainty about regulatory regimes so that meaningful planning, in terms of legal and financial support for developments as well as engineering, can take place.

Aside from any particular resolution to this controversy, NWRA is strongly interested in having the issue of whether tribes have sovereign authority to set standards for nonmember activity on fee land resolved so that its members can plan accordingly in terms of the political regime they will have to work within, the level of standards they will have to meet, and the capital input that will be necessary, should they decide to proceed with further development.

These organizations and individuals, and their counsel, are familiar with the Indian law issues presented by this case and the legal principles that control them. The Districts have appeared before this Court in past actions seeking a writ of certiorari and in submitting an *amicus curiae* brief in *Strate v. A-1 Contractors*, —— U.S. ——, 117 S.Ct. 1404 (1997).

These *amici* have endeavored in the accompanying brief to assist the Court in evaluating the importance of the issue presented for review by presenting facts and arguments, or perspectives on arguments, not presented by the Petitioners.

Counsel for the State of Montana, City of Ronan, and Town of Hot Springs consented to this filing, as has the Solicitor General. Counsel for Respondent Tribes have not consented to this filing.

Dated this 24th day of August, 1998.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1929

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF NATIONAL WATER RESOURCES ASSOCIATION, FLATHEAD JOINT BOARD OF CONTROL OF THE FLATHEAD, MISSION AND JOCKO VALLEY IRRIGATION DISTRICTS, ROSS MIDDLEMIST, WILLIAM SLACK, AND GLEN MURPHY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI [1]

The National Water Resources Association ("NWRA"), Flathead Joint Board of Control of the Flathead, Mission,

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[1] Counsel for the parties did not participate in drafting this brief, and no one other than the *amici curiae* made a monetary contribution to its preparation or submission.

and Jocko Valley Irrigation Districts ("Districts"), Ross Middlemist, William Slack, and Glen Murphy, respectfully submit this brief *amici curiae* in support of the Petition for writ of certiorari to the Ninth Circuit Court of Appeals pursuant to S. Ct. R. 37.

INTERESTS OF AMICI CURIAE

A. The Individuals.

The individual *amici* own land in fee within the exterior boundaries of the Flathead Reservation in Montana, where they reside with their families. They are farmers and ranchers. They are not members of the Confederated Salish and Kootenai Tribes ("Tribes"), but they and their families consume and use water, just as tribal members do. Because they are not tribal members, they have no right to participate in tribal government, either by voting or holding office. ("Nonmember Indians and non-Indians share the same relation to tribal government, in that neither group can typically vote in tribal elections, participate in the tribal jury system, nor can they hold tribal office." *Lower Brule Sioux Tribe v. State of South Dakota*, 917 F. Supp. 1434, 1444 (D.S.D. 1996), citing *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 445 (1989), affirmed, 104 F.3d 1017, 102-1024 (8th Cir. 1997). Nonmembers own land on the Flathead reservation because their predecessors homesteaded and purchased allotments there under the authorization of Congress, which applied the policies of the General Allotment Act ("Dawes Act"), 25 U.S.C. §§ 331, *et seq.*, to the reservation in the Flathead Allotment Act of 1904 ("FAA"). Act of April 23, 1904, 33 Stat. 302.[2] As a result, homesteaders and purchasers of

[2] The demographic consequences of Congress' application of the Dawes Act policies to the Flathead reservation are that nonmembers constitute at least 75% of the reservation population of 21,259 as found in the 1990 census. Nonmembers own almost 50% of the reservation acreage.

allotments who fulfilled applicable requirements obtained fee title and the full value of the land, without any relevant conditions, for example, that their activities on the land would be subject to a tribe's governance. *Montana v. United States*, 450 U.S. 544, 559, n.9 (1981) ("defies reason" Congress would have intended tribes to retain jurisdiction over nonmembers); *Brendale*, 492 U.S. at 437 (concurrence) ("inconceivable" Congress intended tribes to retain jurisdiction over nonmembers).

Their interest arises, specifically, from the fact that the decision below allows the Tribes' government to undertake "core governmental function[s]," Pet. 104a, affecting them and their families—in this case setting the water quality standards applicable to all waters on the reservation—even though, as a limited sovereign generally lacking in powers over nonmembers the Tribes exclude them from exercising fundamental rights of political participation.[3] More generally, their interest arises from the fact

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[3] The importance of this "core governmental function" was recognized by one of EPA's attorneys in this litigation who wrote that setting water quality standards is the foundation on which all other water quality decisions rest and that this governmental action entails political decisions affecting society at large: "[T]ribal governments have been quick to realize the central importance of control over the decision-making process—that is, the government with power to set water quality standards for reservation streams controls the future water quality of the reservation. **Permitting, inspecting, and the taking of civil or criminal action against reservation polluters are necessary control functions, but the overriding factor on which all other activities depend is the preliminary decision as to what the water quality of reservation waters should be. . . . For tribal governments . . . the overarching question has become one of whether the states or the tribes should make those political decisions balancing economic interests against interests of human health and public welfare on the reservations.**" Price, B. Leigh, Jr., "Tribal Programs Under the Clean Water Act: Regulatory Design Considerations," *Mineral Development on Indian Lands*, Paper No. 16, at 16-8 (Emphasis added.)

that the rationale for this decision applies to other areas of jurisdictional dispute both under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (1997), (for example the Tribes have an application pending for recognition of their sovereignty to regulate wetlands) and in other realms of regulatry control, so that, based on this precedent, they will be subject directly to the regulatory control of the Tribes in other areas.[4]

B. The Districts.

In 1908, Congress amended the FAA, in furtherance of the Dawes Act policies, (*see Montana*, 450 U.S. at 559, n.9), and authorized the construction of an irrigation project to serve all the irrigable land on the reservation, whether an allotment (which under the FAA became alienable after a period in trust) or unallotted homestead land. Act of May 29, 1908, 35 Stat. 448, at section 15. In 1926, to further construction on this Project, Congress authorized the formation and operation of the Districts under State law in the Act of May 10, 1926, Ch. 277, 44 Stat. 453, 464. Congress authorized the Districts to embrace within their boundaries and authoriites all fee-owned irrigable lands, including trust allotments once the fee patent has issued. As owners of

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[4] The Court previously considered review of the Ninth Circuit decision applying the legal concept at issue here on the Flathead reservation and finding the Tribes retained jurisdiction to regulate nonmember conduct over land, the south half of Flathead Lake, the circuit had found the Tribes own. *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977-981 (1982). (Rehnquist, C. J. and White, J. dissenting, arguing: "The 'ownership' and 'regulatory' issues present important questions having ramifications throughout the many western states within the jurisdiction of the Court of Appeals for the Ninth Circuit. I would grant certiorari to review that court's decision of both issues.")

irrigable land, each of the individual *amici* is a constituent of one of the three Districts.

Under Montana law, the Districts' authority includes, *inter alia*, the power to construct and maintain dams and reservoirs and other diversions for irrigation works,[5] appropriate water, acquire land, water rights, and water works, enter contracts with the United States, apportion and distribute irrigation water among irrigators, and operate the irrigation project which serves them. *See* Ch. 85, Title 7, Part 19, Montana Code Annotated (1997). The Flathead Joint Board of Control serves as a central operating authority for these Districts and, like the Districts, is a governmental entity under Montana law. § 85-7-1905, MCA.

As local governmental entities of the State which Congress specifically authorized to operate under State law, the Districts interest here is in preventing the disruption of the direct political relationship, and accountability, between their constituents, the Districts, and the State by the intrusion into this relationship of the Tribal governments' authority. The extension of the Tribes' authority to cover water quality matters pertaining to fee lands not only undermines the Districts' authority and the Districts' governmental relationship with the State but it also subjects the great majority of the Districts' constituents who are not tribal members to an unaccountable government in which neither they nor the Districts have any formal right or role. *See United States v. Lopez*, 514 U.S. 549, 577 (1995), citing *New York v. United States*, 504 U.S. 144, 155-163 (1992) and *FERC v. Mississippi*, 456 U.S. 742, 787, (1982) (O'Connor, J., concurring in part and

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[5] The Court found diversions of water, even for nonconsumptive uses, could be limited because of their impact on water quality standards in *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994).

dissenting in part). There, the Court noted "[t]he . . . inability to hold either branch (state or federal) of the government answerable to the citizens is more dangerous even then devolving too much authority to the remote central power." *Id.* (Explanatory parenthetical added.) This is precisely what occurs when a tribal government controls nonmember activity on nontribal land.

C. The National Water Resources Association.

The National Water Resources Association (NWRA) is a not-for-profit federation of water resource organizations in sixteen (16) of the seventeen (17) reclamation states. Its membership includes rural water districts, municipal water entities, and other local governments. Many of these members are Publicly Owned Treatment Works ("POTWs"), which receive wastewater from indirect dischargers, treat it, and then discharge it into navigable waters. Consequently, they must meet applicable water quality standards to receive the certification required under § 401 of the CWA. Some of its members are commercial water supply companies and legal and financial institutions concerned with permitting and financing water supply and treatment facilities.

Among its members are municipal water supply and waste water treatment agencies, POTWs, and rural water districts located on Indian reservations throughout the West. Also among its members are irrigation districts located on Indian reservations in Washington, Oregon, Montana, Wyoming, Nevada and Idaho.

NWRA works for policies that promote the conservation, enhancement, and efficient management and use of water. NWRA advocates laws and regulations that balance the use of water and land resources to meet existing and future needs of the people in their local circumstances with the interests of preserving and enhancing a clean environment. The development of such policies and proj-

ects to meet future needs requires a degree of certainty about regulatory regimes so that meaningful planning, interms of legal and financial support for developments as well as engineering, can take place.

NWRA formally supports, by resolution, the continued development of tribal water quality programs within their sphere of jurisdiction. It does not support the extension of tribal authority over nonmembers and their activities on non-tribal land, primarily because nonmembers have no right to participate in tribal governments. In view of the critical importance of water and, particularly in the West where water is scarce, the fundamental social issues control of water use involves, NWRA strongly supports governmental authority over water use that is accountable to all citizens. Lacking political accountability to nonmembers, Tribal sovereign authority to govern water use by nonmembers will, in NWRA's view, alienate nonmembers and leave them disaffected from the entire process, making it more difficult to develop and particularly to implement sound policies promoting wise use of water.

Aside from any particular resolution to this controversy, NWRA is strongly interested in having the issue of whether tribes have sovereign authority to set standards for nonmember activity on fee land resolved so that its members can plan accordingly in terms of the political regime they will have to work within, the level of standards they will have to meet, and the capital input that will be necessary, should they decide to proceed with further development.

SUMMARY OF ARGUMENT

The issue presented here flows not from a discretionary act of EPA but from the result of its mandatory obligation to make a legal determination whether, under the second *Montana* exception, the Tribes retain inherent sovereign authority to set water quality standards for the entire reservation. The Ninth Circuit's affirmance of this

decision on a *de novo* review conflicts with applicable principles established by the Court in *Montana*, 450 U.S. 544 (1981), *Brendale*, 492 U.S. 408 (1989), *South Dakota v. Bourland*, 508 U.S. 679, (1993), and *Strate v. A-1 Contractors*, —— U.S. ——, 117 S.Ct. 1404 (1997). Moreover, this decision conflicts, in principle if not directly, with decisions of other circuits and lower courts that have analyzed and applied the exception. Finally, the Ninth Circuit's decision to uphold EPA's application of the exception in this case will have broad and deep consequences. Tribes throughout the country will be found to possess inherent sovereign authority for a broad range of "health and welfare" issues under EPA's simplistic analysis. On reservations where nonmembers reside, the extension of tribal authority in this manner will cut deeply into the most fundamental rights and liberties of U.S. citizens.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION PRESENTS THE CLEAN LEGAL ISSUE WHETHER A TRIBE'S INHERENT SOVEREIGNTY EXTENDS TO NONMEMBER CONDUCT ON FEE LAND THAT DOES NOT DIRECTLY AFFECT THE TRIBE'S ABILITY TO GOVERN ITS INTERNAL MATTERS.

1. The Tribes cast EPA's decision as having merely been just another discretionary decision in its implementation of § 518, under which, incidentally, it treats tribes as the "functional equivalent of states." Tr. Bf. 2. Consequently, the Tribes claim the State's request for review from this Court, backed by eleven (11) other states, proceeds from a "fabricated argument that the TAS decision is predicated upon EPA's erroneous interpretation of the doctrine of inherent Tribal sovereign powers." *Id.* at 10. This downplaying of EPA's decision seriously misreads the records, including the Tribes' own submissions.

2. EPA's rulemaking process and the preamble to the final rules dealt extensively with how EPA would determine whether an applicant tribe possessed sovereign power to carry out the program for which it sought TAS. Pet. 92a-110a. The first document in the administrative record for the TAS decision at issue here consists of thirty-eight (38) pages from the Tribes' application explaining the scope of their jurisdiction, particularly over nonmembers. AR1, esp. 54-85. In their application, the Tribes asserted:

> "It is presently unquestioned that, unless expressly divested by Congress, tribal governments have 'police powers' to safeguard the health, safety, and cultural and social welfare of tribal members by regulation of activities and conduct, and to regulate the use of lands on Federal Indian reservations by all persons to promote the health, safety and welfare of the tribes. These police powers of Tribes are grounded in Tribal inherent sovereignty . . . ." AR1, 54.[6]

On this erroneous basis, the Tribes claimed, "[i]nherent tribal sovereignty forms the basis for the territorial jurisdiction of an Indian tribe over its reservation . . . ." AR4, 37. In reviewing this claim and finding the Tribes possess such sovereign power, EPA plainly understood that its decision was whether or not the Tribes possessed such inherent sovereign authority. EPA's decision document stated: "The Agency is satisfied that the . . . Tribes . . .

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[6] The Tribes filed a special addendum to their application on July 13, 1993, one month after the Court's decision in *South Dakota v. Bourland*, 508 U.S. 679 (1993). Concerned that EPA might view *Bourland*, which addressed tribal regulatory jurisdiction over nonmembers on an opened reservation like the Flathead reservation, as relevant and adverse to their assertion of sovereign authority in this case, the Tribes argued the *Bourland* decision "while potentially detrimental to Tribal regulatory authority based solely on inherent sovereign authority . . . bolsters Tribal authority when, as in this case, Congress delegates authority under the CWA to Tribes." AR11.

have adequate jurisdiction to set water quality standards for waters within the exterior boundaries of the Reservation . . . ." Pet. 60a.

In its decision upholding EPA's decision, the Ninth Circuit clearly understood its task was to determine the legal question whether EPA had properly "delineated" the second *Montana* exception and found the Tribes possess inherent sovereignty on that basis. Pet. 11a-12a. The Circuit court's *de novo* review and approval of EPA's legal determination of the Tribes' jurisdiction on the basis of that exception is squarely presented for review here.[7]

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND IT CONFLICTS IN PRINCIPLE IF NOT DIRECTLY WITH DECISIONS OF OTHER CIRCUITS.[8]

1. "[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate*, 117 S.Ct. at 1409.[9] The Court has required that for a

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[7] The Ninth Circuit held no deference is due EPA's ruling on this legal issue (Pet. 11a). "[T]he scope of inherent tribal authority is a question of law for which EPA is entitled to no deference. . . . EPA's delineation of the scope of that standard . . . has nothing to do with its own expertise or with any need to fill interstitial gaps in the statute. . . ." Review of this ruling has not been sought here.

[8] In *United States v. Johnson*, 481 U.S. 681, 685 (1987), the Court granted *certiorari* to review the "reformulation" of one of its doctrines by the Ninth Circuit Court of Appeals and to resolve a conflict among the circuits, including a "conflict[] in principle." *Id.* at 685, n.4. The Court also granted *certiorari* to the Ninth Circuit in *Oregon Department of Fish annd Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 764 (1985), to resolve an apparent "conflict in principle" with the Eighth Circuit.

[9] That there is no federal statute or treaty basis for the Tribes' authority here was not questioned by EPA or the lower courts. By rule, EPA determined the statute did not delegate authority to Tribes. Pet. 111a. Neither the Tribes nor EPA argued any treaty provision supplies the source of the Tribes' claimed sovereignty.

Tribe to possess retained inherent sovereign authority over such nonmember conduct "in limited circumstances" it must demonstrate that the conduct directly, adversely affects the tribe's ability to govern itself. *Id.* at 1416. The Court explained the scope of such self government by specifying four areas the nonmember conduct must adversely affect to trigger a Tribe's inherent sovereignty: its power to punish tribal offenders, determine tribal membership, regulate domestic relations among members, and prescribe rules of inheritance for members. *Id.*

The Ninth Circuit's decision ignores these limitations. It approved EPA's decision that, after only a "minimal showing" that water is present on the reservation and tribal members use water, it may "presume," Pet. 105a-106a, the tribe has jurisdiction to set quality standards because nonmember conduct may affect **tribal members** (not the Tribe itself). Yet neither EPA nor the Tribes demonstrated how matters of water quality impact the Tribes' powers of self-government to punish tribal offenders, determine tribal membership, regulate domestic relations among members, or prescribe rules of inheritance.

2. Moreover, the Court has clearly stated that the broad police power to regulate water quality is beyond the scope of tribal power over nonmembers it enumerated in *Strate*. *See Brendale,* 492 U.S. at 429, and n.11 (tribes do not have police power); *United States v. Lopez,* 514 U.S. 549, 566-68, (1995) (police power reserved by Constitution to States.); *Id.* at 552 ("constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.' ") (Citation omitted.) This is a fundamental barrier to finding tribal jurisdiction in this case, Respondents' desire for which cannot "take precedence over the Constitution." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 168, (1996) (dissent of Stevens, J.) As the Court held in *Lopez* in a different context, "[t]o uphold the Government's contentions here, would [be] to pile inference upon

inference in a manner that would bid fair to convert (tribal) authority under (their retained inherent sovereignty) to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. (Parentheticals added.)

3. But, even assuming Tribes could possess such police power, in justifying its decision, Pet. 12a, the Ninth Circuit also ignored the fact that the Court has found against tribal jurisdiction over nonmembers in cases presenting conceptually similar issues—i.e. whether a tribe has authority over nonmember activity on fee land that has mobile effects and whether "checkerboard jurisdiction" is permissible. *See Montana*, 450 U.S. 566; *Brendale*, 492 U.S. at 430-431, and *see South Dakota v. Bourland*, 39 F.3d 868 (8th Cir. 1994). EPA linked the issues of "mobile effects" and checkerboard jurisdiction in its final rules and said they justified finding Tribal, not State, jurisdiction over nonmember land. Pet. 102a-103a.

Contrary to this, "in *Montana*, *Brendale*, and *Bourland* the Court 'authorized such 'checkerboard' jurisdiction by mandating that neighboring tracts of land be subject to different regulatory authorities on the basis of the type of ownership, or the nature, of the land." *Lower Brule*, 917 F. Supp. at 1448, quoting *South Dakota v. Bourland*, 949 F.2d 984, 996 (8th Cir. 1991), affirmed *Lower Brule Sioux Tribe v. State of South Dakota*, 104 F.3d 1017, 1024 (8th Cir. 1997). For example, in *Montana*, the Court rejected tribal jurisdiction over nonmember hunting and fishing on and from fee land. The effects of such activity, which impact water and migratory fish and game populations, are clearly mobile. Yet this gave the Court no pause because the place of the activities and the persons conducting them are fixed, determinable facts. In *Bourland* the Court also had no hesitation in holding the Tribe's jurisdiction had been abrogated, even though the effects of nonmember hunting and fishing clearly cross land ownership boundaries. Even in *Brendale*, the Court

held the Tribes at issue lacked jurisdiction to zone nonmember land in an open area even though the effects of land use—industrial, commercial, residential—are not restricted to that parcel of land. There are predictable, migratory effects that come from particular land uses. For example, the aestheic effect of a use of land is not limited to that parecl. Nor are the effects of the various discharges into the air or water or onto the land from particular uses allowed by zoning laws limited to that parcel. Thus, while the land at issue in *Brendale* was, obviously, not mobile, the effects of the nonmember conduct on that land were.

4. Finally, EPA's reliance on legislative findings unrelated to § 518 of the CWA, added 15 years after Congress made the findings, as the foundation for its decision only compounds its error of using after-the-fact documentation [10] to support its decision. *See Lopez*, 514 U.S. at 563. ("[I]mportation of previous findings" inappropirate because they do not speak to the subject matter of the provision they are used to justify.)

Without the use of these "findings" to establish, under EPA's reasoning, the presumption of tribal jurisdiction over nonmember activity, EPA's list of examples of nonmember pollution is insufficient, not least because EPA excluded any person or entity from participating in the administrative process save for the State of Montana, other federal agencies, and other Indian tribes.[11] More

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[10] *See* Petition at 9 and brief of eleven *amici* States at p. 4, n.2, noting the chronology of EPA's documentation of factual support for its finding in this case and in other cases.

[11] This administrative exclusion was circumvented, somewhat, by means of sending comments to the State which then submitted them unchanged to EPA. As a result, in the adminisrative record at tab 20 there are many letters and a petition, signed by hundreds and perhaps thousands of reservation residents, expressing opposition, on fundamental constitutional grounds, to a finding that the Tribes have jurisdiction over them. As a legal matter, however, this exclu-

specifically, this list of examples is unpersuasive because EPA's reasoning fails to consider that the Tribes' 4,000 members, as well as the 17,500 other people living on the reservation, are now and have been since the passage of the CWA in 1972 under the protection of and subject to the standards and programs of that Act, just like the rest of the United States. EPA's decision depicts the reservation as having no regulatory controls protecting water quality, subjecting the Tribes and their members to unrelieved and unconstrained water pollution. That is inaccurate. The Tribes and their members are, in fact, protected, as all United States residents are, by the nationally applicable federal standards and, where applicable —i.e. nonmember fee land—state standards which meet or exceed these minimums. EPA failed to explain how, given these regulatory regimes, which Congress and the Montana legislature deem adequate to protect the citizenry, the health and welfare of the Tribes could be imperilled.

5. The Ninth Circuit's decision also conflicts in principle, if not directly, with decisions of other Circuits and lower courts that have applied the second *Montana* exception in similar circumstances, though not dealing specifically with TAS decisions of EPA. Contrary to the Ninth Circuit, these courts recognized that the tribe asserting sovereign power must demonstrate, in the "necessary particularized inquiry," (*Lower Brule*, 104 F.3d at 1023), that the nonmember conduct at issue directly, adversely affects the Tribe, not just tribal members. Moreover, the requisite effect on the tribe, according to these courts, unlike the Ninth Circuit, must be to powers of self-government—the tribe's political integrity, economic security, or health and welfare, as the Court outlined initially in *Montana*. Finally, these Courts, unlike the Ninth Circuit, recognized that these effects must affect the tribe's powers of self-government not "in general"

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sion had the effect of preventing any person or entity other than the State from obtaining judicial review of EPA's decision.

but "in purely intramural matters." *See Lower Brule*, 104 F.3d at 1022-1024 (finding tribe failed in its second *Montana* showing after the "necessary particularized inquiry" to demonstrate nonmember hunting and fishing of "migrating game populations," even though "vexatious," presents a "direct threat to the welfare of the Tribe as a whole," and " 'checkerboard' jurisdiction had been authorized by the Supreme Court)[12]; *State of South Dakota v. Bourland*, 39 F.3d 868, 869-870 (8th Cir. 1994), on remand from *South Dakota v. Bourland*, 508 U.S. 679, (1993) (rejecting claim of inherent sovereignty based on direct effect from nonmember hunting and fishing, including adverse effect on game populations, because such effects "do not amount to a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe as a whole. . . ."); *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F. Supp. 878, 889 (D.S.D. 1995) (limited and somewhat contradictory evidence "regarding impact of the proposed municipal solid waste landfill on the political integrity, economic security, or health and welfare of the Tribe" fails to give rise to tribal sovereignty)[13]; *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 178-179 (2d Cir. 1996) (analyzing the second *Montana* exception in determining whether OSHA applies to a tribal business the Second Circuit rejects as "too grandiose a concept of

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[12] *And see* dissent of Beam, Circuit Judge, arguing, as the Ninth Circuit held here, the second *Montana* exception provides for tribal sovereignty when the nonmember conduct has any effect on the Tribes' members, the same reasons advanced in his dissent from the Circuit's decision in *Strate v. A-1 Contractors*, 76 F.3d 930 (8th Cir. 1996), which this Court rejected in affirming the en banc circuit decision. *Strate, supra.*

[13] The Tribe did not appeal this ruling. Therefore, it was not at issue in the Court's reversal of the Eighth Circuit's affirmance of the district court that the Yankton Sioux reservation had not been diminished. *South Dakota v. Yankton Sioux Tribe*, —— U.S. ——, 118 S.Ct. 789 (1998).

tribal sovereignty" the argument that any activity that involves tribal entities or people necessarily involves and is subject to only the tribes' sovereignty and casts the issue raised by the second *Montana* exception as "not whether the statute affects tribal self-governance **in general** but rather whether it affects tribal self-governance **in purely intramural matters.**") (Emphasis in original.)

These courts have read and applied the Courts' decision more narrowly and precisely than the Ninth Circuit. The principles of their decisions conflict with those of the Ninth Circuit's and this conflict warrants resolution by the Court.

III. THE SCOPE OF EPA'S RATIONALE APPLIES NATIONWIDE AND IF ALLOWED TO STAND WILL RESULT IN SIGNIFICANT ABRIDGEMENT OF FUNDAMENTAL RIGHTS OF NONMEMBERS TO PARTICIPATE IN GOVERNMENTS UNDER WHICH THEY LIVE.

The impact of the Ninth Circuit's decision is nationwide, Pet. 135a-146a, and it penetrates into the delicate balance between the state and federal sovereigns devised in the Constitution. Hundreds of Tribes have applied for the same treatment from EPA. Indeed, Tribes this Court has ruled lack jurisdiction over nonmembers for regulatory programs very similar to the programs at issue here as to the legal issues they raise concerning tribal jurisdiction over nonmembers will be deemed to have such jurisdiction by EPA under the rationale it applied in this case.[14] The significant incursion on the values of Fed-

---

[14] *Compare* TAS approvals for Confederated Tribes and Bands of the Yakama Indian Nation, Pet. 145a, with *Brendale*, 492 U.S. 408 (1989); and for Crow Tribe, Pet. 140a, with *Montana*, 450 U.S. 544 (1981); Also *Compare* TAS approval for Yankton Sioux Tribe, Pet. 141a, with *Yankton Sioux Tribe v. State of South Dakota*, 890 F. Supp. 878, 888 (D.S.D. 1995); and TAS approval for Lower Brule Tribe, Pet. 141a, with *Lower Brule Sioux Tribe v. State of South Dakota*, 104 F.3d 1017, 1022-24 (8th Cir. 1997).

eralism and the fundamental liberties it secures, *Lopez*, 514 U.S. 549, 552, is confirmed by both the assertions of the Tribes and the approval of EPA. The Tribes explicitly grounded their assertion of such authority on their claim to possess "police powers," (AR1, 54), giving them "territorial jurisdiction," (AR4, 37), throughout reservation land. Approving this claim, EPA explicitly grounded its decision on the basis that Tribes retain such "core governmental functions" "to protect public health and safety." (Pet. 104a.) This ranges far beyond the powers of self-government the Court has found tribes retained upon incorporation into the United States. *Strate*, 117 S.Ct. at 1416. Tribes' sovereignty may fit comfortably within the constitutional framework when limited to their members. But when it is extended to embrace police powers, which the Constitution reserved to states, and to nonmembers, whose fundamental rights and liberties are not secured when they are properly within a tribe's jurisdiction, it raises significant questions regarding the place of sovereign tribes within our federal structure.

Finally, the depth of the mischief wrought by the Ninth Circuit's decision, cannot be overstated in regard to the rights of individuals who are not tribal members but who lawfully reside and own land within an Indian reservation. Should the Ninth Circuit's decision pass unreviewed, their disenfranchisement from the government which enacts water quality standards applicable to the water they use would be replicated throughout the United States. *See* Pet. 135a-146a. As noted by EPA, setting water quality standards is a "core governmental function." Such functions, in our system, are properly taken by a government accountable to the people subject to its decisions. If Tribes have sovereign authority over nonmembers for such "core governmental functions" such accountability, and the values it preserves, will be lost.

Such unaccountable government is reason, and has been since the incubation of this Nation in the toils of unrepresentative government, for grave concern.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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No. 97-1929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, MONTANA, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a federally recognized Indian tribe, accorded treatment as a state status by the Environmental Protection Agency pursuant to section 518(e) of the Clean Water Act, as amended, 33 U.S.C. § 1377(e), has authority delegated by Congress to establish water quality standards for fee lands owned by non-members within the borders of its reservation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1929

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, MONTANA, IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana ("Fort Peck"), *amicus curiae* herein,[1] is a federally recognized Indian tribe which exer-

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[1] Pursuant to Rule 37.6, it is stated that counsel for *amicus curiae* authored all of this Brief in Opposition, and no person or

cises substantial governmental duties and powers through an elected Tribal Executive Board. As such, and like respondent Confederated Salish and Kootenai Tribes of the Flathead Reservation ("Flathead Tribes"), Fort Peck qualifies for treatment as a state ("TAS") by the Environmental Protection Agency ("EPA") under Section 518(e) of the Clean Water Act, as amended ("CWA"), 33 U.S.C. § 1377(e).

On March 24, 1994, Fort Peck applied to EPA for approval of a water quality standards program pursuant to sections 303 and 518(e) of the CWA. In its application Fort Peck asserted authority over all water resources within the boundaries of the Fort Peck Reservation, including water appurtenant to fee patented lands owned by non-members. Fort Peck's assertion of authority included the power to regulate the water related activities of all persons within the Reservation which might impair the quality of Reservation water resources and critical habitat. As was the case with respect to the Flathead Tribes, the State of Montana opposed Fort Peck's application to EPA, alleging that Indian tribes have no jurisdiction over non-member activities on fee lands. On August 29, 1996, however, EPA approved Fort Peck's application in its entirety. Again as was the case with respect to the Flathead Tribes, Montana has challenged that determination in court. *See State of Montana v. U.S. Environmental Protection Agency*, No. CV-97-49-BLG-JDS (D. Mont.).

The ability to supervise all environmentally sensitive water uses within the Reservation is essential to an effective tribal water quality standards program. Accordingly, because of its direct and obvious interest in the issue here presented, Fort Peck submitted an *amicus curiae* brief in

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organization other than *amicus curiae* made a monetary contribution to the preparation or submision of the brief. Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief *amicus curiae*, and those consents have been filed with the Clerk.

support of the Flathead Tribes in the district court (*see* Petition at 29a-30a, 44a, n. 10) and, with other Indian tribes, also an *amicus curiae* brief in the court below.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S QUESTION PRESENTED IS ACADEMIC AND THUS NOT WORTHY OF THIS COURT'S CONSIDERATION BECAUSE, AS JUSTICE WHITE RECOGNIZED IN *BRENDALE V. CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION*, CONGRESS IN THE CLEAN WATER ACT EXPRESSLY DELEGATED TO INDIAN TRIBES AUTHORITY TO ESTABLISH WATER QUALITY STANDARDS FOR RESERVATION LANDS OWNED BY NON-MEMBERS.

A. The issue posed by petitioners is not dispositive of the case.

In *Montana v. United States*, 450 U.S. 544 (1981), recently reaffirmed in *Strate v. A-1 Contractors*, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), this Court determined that, although the general rule may be otherwise, Indian tribes under federal common law have inherent sovereignty to regulate the conduct of non-members on fee patented lands within their reservations where "that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. . . ." *Strate v. A-1 Contractors*, 117 S.Ct. at —, 137 L.Ed.2d at 671 (quoting *Montana*, 450 U.S. at 565-66). In this case, EPA, the district court and the unanimous Ninth Circuit panel below all concluded that the serious and substantial impact of water quality upon human health and welfare fully justified application of this so-called second *Montana* exception in the context of the CWA.[2] As posed by petitioners, the question here pre-

[2] The principle that Indian tribes, under appropriate circumstances, can exercise civil regulatory authority over non-member

sented thus is whether an Indian tribe under *Montana* can exercise "inherent regulatory authority" with respect to water resources on fee lands owned by non-members within its reservation. That question, however, need not and should not be addressed by the Court.

Specifically, in *Strate* this Court also declared that "the general rule and exceptions . . . announced [in *Montana*] *govern only in the absence of a delegation of tribal authority by treaty or statute.*" 117 S.Ct. at —, 137 L.Ed.2d at 673 (emphasis added). The threshold question before the Court in this case, therefore, is whether sections 518(e) and (h)(1) of the CWA, 33 U.S.C. §§ 1377 (e) and 1377(h)(1), effect a delegation of regulatory authority to Indian tribes. According to *Strate*, if "after and in light of that examination" (117 S.Ct. at —, 137 L.Ed.2d at 673) the proposition is clear—as it is (*see* discussion Point B *infra*)—that Congress in the CWA has authorized Indian tribes to regulate water resources appurtenant to non-member owned fee lands within their reservations, then the Court need never consider *Montana's* general rule and its exceptions. In short, the question presented by petitioners is academic and the case plainly unworthy of this Court's review.

B. Congress delegated regulatory authority to Indian tribes in the CWA.

In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, supra,* Justice White, for himself and three other members of the Court, cited the CWA ("33 U.S.C. § 1377(e) and (h)(1)") as a statute where "Congress has expressly delegated" to Indian tribes "the

activities on fee patented reservation lands is now well settled. This Court so held with respect to the "closed area" involved in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 440 (1989) (opinion of Stevens, J.); *see also Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.")

power to . . . [regulate] fee lands of non-members of the Tribe." 492 U.S. at 428. That Justice White's characterization of the CWA is apt appears on the face of the statute.

The territory in which a tribe may exercise its jurisdiction, if accorded TAS status by EPA, is defined in section 518(e), 33 U.S.C. § 1377(e). Under section 518(e)(2), Indian tribes may exercise governmental powers with respect to "the management and protection of water resources" which are: (1) "held by an Indian tribe," (2) "held by the United States in trust for Indians," (3) "held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation," or (4) *"otherwise within the borders of an Indian reservation."* 33 U.S.C. 1377(e)(2) (emphasis added). The first three of these categories involve only tribal lands and individually owned trust lands. The fourth statutory category necessarily applies to fee lands.[3] Indeed, any other construction of the fourth provision would render it redundant and surplus verbiage in contravention of the cardinal rule of statutory construction that all provisions of a statute must be given effect and "should be interpreted so as not to render one part inoperative." *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. ——, 127 L.Ed.2d 165, 174 (1994) (citing *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)).

The phrase "otherwise within the borders of an Indian reservation" is clear and unambiguous.[4] An Indian reser-

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[3] Petitioners do not contest the authority of the Flathead Tribes to regulate activities on fee lands owned by tribal members. Petition at 8, n.3; *see* the unanimous opinion by (then) Justice Rehnquist in *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 477-79 (1976), in which this Court rejected the State's claim of tax jurisdiction over Indians living on fee lands within the Flathead Reservation.

[4] Even if this language were ambiguous, well settled canons of statutory construction dictate that the phrase be broadly construed

vation is defined for purposes of the CWA as "*all* land within the limits of any Indian reservation . . . *notwithstanding the issuance of any patent*, ..." 33 U.S.C. § 1377(h)(1) (emphasis added), or, in other words, as including all reservation lands regardless of their fee patent status or non-member ownership. This Court has so held under comparable circumstances. *See, e.g., Seymour v. Superintendent*, 368 U.S. 351, 358 (1962) (identical statutory definition of "Indian country" in 18 U.S.C. § 1151 held to include fee patented land owned by a non-Indian); *see also Solem v. Bartlett*, 465 U.S. 463, 468 (1984). In short, when treated as a state by EPA under section 518(e) of the CWA, an Indian tribe's territorial jurisdiction and resultant administrative authority are reservation-wide by virtue of an express statutory definition.

The proposition that Congress may delegate to Indian tribes civil regulatory powers over non-members on fee lands within a reservation is not open to question. *See* (then) Justice Rehnquist's opinion for a unanimous Court in *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975). As Justice White recognized in *Brendale*, Congress did so in the CWA. The Court, therefore, need not and should not ever decide whether the Flathead Tribes also possess "inherent regulatory authority" under *Montana* to promulgate water quality standards on all lands within the borders of their reservation.

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in favor of the Indians. *County of Yakima v. Yakima Nation*, 502 U.S. 251, 269 (1992) (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)); *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

CONCLUSION

In response to the State's attack upon Fort Peck's regulatory authority under the CWA over all Reservation lands (*Montana v. EPA*, No. CV-97-49-BLG-JDS (D. Mont.), *supra* at 2), Fort Peck is raising before the district court the powerful delegation argument described in this brief. The limited question here presented by petitioners is plainly not dispositive of the underlying issues in the present case. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

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STATE OF MONTANA, et al.,

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* SUNNYSIDE VALLEY IRRIGATION DISTRICT, YAKIMA-TIETON IRRIGATION DISTRICT, KITTITAS RECLAMATION DISTRICT, ROZA IRRIGATION DISTRICT AND KENNEWICK IRRIGATION DISTRICT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF BY SUNNYSIDE VALLEY IRRIGATION DISTRICT, KENNEWICK IRRIGATION DISTRICT, YAKIMA-TIETON IRRIGATION DISTRICT, KITTITAS RECLAMATION DISTRICT AND ROZA IRRIGATION DISTRICT

COME NOW Sunnyside Valley Irrigation District and all other irrigation districts within the Sunnyside Division of the Yakima Reclamation Project, Yakima-Tieton Irrigation District, Kittitas Reclamation District, Roza Irrigation District and Kennewick Irrigation District ("Districts") and respectfully move this Court for leave to file an *Amici Curiae* Brief in support of Petitioner's "Petition for Writ of Certiorari".[1] The Districts submit this Motion pursuant to Rule 37 of the United States Supreme Court Rules.

The Environmental Protection Agency ("EPA") and the State of Montana have consented to the filing of this Brief. The Confederated Salish and Kootenai Tribes have not consented.

The Districts divert and deliver irrigation water from the Yakima River and its tributaries for irrigation use and re-use pursuant to Washington State vested water rights and contracts with the United States Bureau of Reclamation ("USBR"). A portion of the diverted irrigation water, after use and re-use, is returned to the Yakima River or its tributaries.

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[1] No counsel for any party authored any portion of this Brief. No person or entity, other than the *amici curiae* have made a monetary contribution to preparation and submission of this Brief.

The Yakama Indian Nation has applied to EPA for treatment as a state ("TAS") pursuant to 33 U.S.C. 1377(e). Among other things, the Yakama Nation application seeks authority to regulate the entire 214 river mile Yakima River which is adjacent, for 47.1 river miles, to the eastern border of the reservation.

Although the Districts and their landowners are located outside the exterior borders of the Yakama Reservation and the Districts' diversions from, and return flows to, the Yakima River and its tributaries are all outside the exterior borders of the reservation, Yakama Nation regulation of the Yakima River adjacent to the reservation would, pursuant to *City of Albuquerque vs. Browner*, 93 F.3d 415 (10th Cir. 1996), cert. denied ___ U.S.___, 118 S.Ct. 410, 139 L.Ed.2d 314, directly, significantly, adversely impact the Districts and their landowner-waterusers' vested Washington State water rights and property.

The issues presented for review in this case relate to the erroneous policies, presumptions, procedures and standards EPA applies to determine whether or not a tribe has civil regulatory authority over non-tribal members on fee land within or outside the reservation. The effect of granting TAS status to a tribe, pursuant to *City of Albuquerque, supra*, extends tribal authority and control of non-tribal members activities, including Petitioner-Districts herein, outside the reservation. The extra-territorial effect of the tribe's "Treatment as a State" outside the reservation pursuant to the Clean Water Act will not be presented by any of the present parties and the Districts believe their briefing of the issue will significantly assist the Court.

DATED: August 24, 1998.

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION

The *Amici Curiae* Sunnyside Valley Irrigation District and all other irrigation districts within the Sunnyside Division of the Yakima Reclamation Project, Yakima-Tieton Irrigation District, Kittitas Reclamation District, Roza Irrigation District and Kennewick Irrigation District ("Districts") through their respective counsel respectively submit a "Brief" pursuant to S.Ct.R. 37.2 in support of the "Petition for Writ of Certiorari".

INTEREST OF *AMICI*

Amici – Sunnyside Valley Irrigation District and all other irrigation districts within the Sunnyside Division of the Yakima Reclamation Project, Yakima-Tieton Irrigation District, Kittitas Reclamation District, Roza Irrigation District and Kennewick Irrigation District ("Districts") are political subdivisions of the State of Washington which operate irrigation delivery and drainage facilities within the United States Bureau of Reclamation ("USBR") Yakima Reclamation Project. ("YRP")

Five (5) USBR dams in the Cascade Mountains collect and store irrigation water (in which the Districts water users are contractee/beneficiaries) during the non-irrigation season for use and reuse in the spring, summer and early fall.

The Districts, pursuant to their waterusers Washington State vested irrigation water rights and contracts with the USBR, divert both natural flow and stored water from the Yakima River and its tributaries, and deliver the

water for the irrigation of approximately 329,150 acres within Benton, Kittitas, and Yakima Counties, Washington.

A portion of the water delivered for irrigation is, after agricultural use and reuse, collected in drains and returned as "Agricultural Return Flows" to the Yakima River or its tributaries. The eastern boundary of the Yakama Indian Reservation located in Yakima County, Washington borders the west bank of the mainstem Yakima River for 47.1 river miles between the mouth of Ahtanum Creek (Yakima River Mile 106.9) and the Mabton-Sunnyside Bridge (Yakima River Mile 59.8).

On 11/04/94, the Yakama Indian Nation filed an application with the United States Environmental Protection Agency ("EPA") for "treatment as a state" ("TAS") to develop and administer water quality standards and water quality certification programs pursuant to Sections 303c, 401 and 518 of the Clean Water Act. [11/04/94 Jerry Meninick, Chairman, Yakama Tribal Council – Chuck Clarke, Regional Administrator, EPA letter, Appendix pp. 1-8 (herein "Yakama TAS Application")].

The Yakama Nation's application requested:

* * *

> " . . . approval to develop and administer water quality standards for all waters which by the course of nature or as a result of artificial works, diversion or artificial stream flow enhancement, arise on, border, traverse or underlie the Yakama Reservation. These waters include all surface and ground waters, intermittent and ephemeral streams, springs, seeps, wetlands and

> other waters which lie within or form the exterior boundaries of the Yakama Indian Reservation." (Yakima TAS, Appendix p. [1]).

* * *

The Yakama Nation proposes to regulate the entire 214 river miles of the Yakima River from the headwaters in the Cascade Mountains to the rivers confluence with the Columbia River, not just the immediate 47.1 mile area which borders the eastern boundary of the Yakama Reservation. (Major reservation "water bodies" to be included in Yakama Nation water quality standards are identified on p. 1, Attachment to Yakima TAS Application, Appendix pp. 4-8.)

EPA precludes the Districts from objecting to, or commenting on, the Yakama's TAS application before the EPA grants TAS status to the tribe. 58 Fed.Reg. 8178 (1993).

All of the Districts are located outside the Yakama Indian Reservation's exterior boundaries. Although the Yakima River is the eastern reservation boundary, the river is *not* within the reservation. District irrigation diversions reduce the quantity of water flowing by the reservation, and irrigation "return flows" from land within the Districts may affect the water quality of the river as it flows by the 47.1 mile reservatiom "boundary" reach of the Yakima River proposed to be regulated by the Yakamas.

In *State vs. Acquavella*, Yakima County, Washington Superior Court Case No. 77-2-01484-5, a pending general adjudication of water rights in the Yakima River Basin

pursuant to RCW Chap. 90.03 and the McCarran Amendment, 43 U.S.C. 666, the Trial Court has established and limited the Yakama Nation treaty reserved water rights for both irrigation and fishery purposes. The Trial Court's "Decision" on Indian treaty reserved rights has been affirmed by the Washington State Supreme Court, *Department of Ecology vs. Yakama Reservation Irrigation District*, 121 Wn.2d 257, 850 P.2d 1306 (1993).

Although the discharge of "Agricultural Return Flows" is not a "point source" subject to regulation pursuant to the Clean Water Act (33 U.S.C. 1251, *et seq.*) [33 U.S.C. 1632(14)], each of the Districts has established water quality policies and is engaged in programs to improve the quality of water returned to the Yakima River or its tributaries after agricultural use and reuse.

The State of Washington's Department of Ecology ("DOE") has adopted water quality standards and regulations and administers a Clean Water Act "NPDES" permit system for the Yakima River and its tributaries pursuant to RCW Chap. 90.48.

City of Albuquerque vs. Browner, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, ___ U.S. ___, 118 S.Ct. 410, 139 L.Ed.2d 314 (1997), held CWA regulations adopted by a tribe pursuant to its TAS status were applicable to off-reservation activities of non-tribal members. EPA granting of TAS status to the Yakama Nation for the "water bodies" requested in the Yakama TAS application will adversely, directly, significantly impact the Districts' diversion, use and reuse of irrigation water from the Yakima River.

The Ninth Circuit Court of Appeals "Decision" ratifies the EPA's practice of granting TAS status to tribes without consideration of applicable Court-established standards or limitations on tribal jurisdiction over non-tribal members and without consideration of existing water quality programs established by the states and their irrigation district, municipal and other political subdivisions. EPA's TAS policy extends beyond the authority granted by Congress to EPA in the Clean Water Act and threatens to create serious jurisdictional conflicts between federal, state and municipal agencies as well as to unlawfully destroy, diminish, impact and "take" private property without just compensation.

SUMMARY OF ARGUMENT

The "Petition for Writ of Certiorari" in this case should be granted to review EPA's implementation of 33 U.S.C. 1377(e) which erroneously presumes a tribe's inherent sovereignty to regulate non-tribal member activity and disregards substantial and significant State regulation pursuant to the CWA contrary to well-established judicial standards for determining the extent of a tribe's civil regulatory jurisdiction over non-members.

THE "PETITION" SHOULD BE GRANTED TO REVIEW AND TO CORRECT THE ERRONEOUS PRESUMPTIONS AND STANDARDS PURSUANT TO WHICH EPA REVIEWS AND GRANTS TAS APPLICATIONS.

EPA standards for granting TAS status to tribes completely disregard the holding of this Court in *Montana vs. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and the Court's recent description of limitations of tribal regulatory authority over non-tribal members in *Strate vs. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997).

When reviewing a tribe's TAS application, EPA begins with the erroneous "initial presumption" a tribe generally possesses the authority to regulate activities affecting water quality *on* the reservation. 56 Fed.Reg. 64,881 (1991).

EPA's erroneous initial presumption is then applied to EPA's policy for granting TAS status to a tribe by only requiring the tribe to:

* * *

> " . . . make a relatively simple showing of facts that there are waters within the reservation used by the tribe . . . EPA will, in light of the facts presented by the tribe and the generalized statutory and factual findings regarding the importance of reservation water quality . . . *presume that there has been an adequate showing of tribal jurisdiction* . . . unless . . . [a State] demonstrates a lack of jurisdiction on the part of the tribe." 56 Fed.Reg. 64,878 (1991) (emphasis added).

EPA's erroneous presumptions and policy for granting TAS applications are directly contrary to this Court's

following holding in *Montana* on tribal regulatory jurisdiction over non-tribal members:

* * *

> "Though *Oliphant* [*vs. Suquamish Indian Tribe*, 435 U.S. 191] only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even non-Indians on fee lands. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or the health and welfare of the tribe. (Footnotes and citations omitted)." 450 U.S. at 565.

* * *

The actual presumption created by *Montana* is: a tribe has been divested of regulatory jurisdiction over non-tribal members *unless, in the CWA context,* the tribe establishes the non-tribal members' activity actually threatens or has some direct, significant adverse effect on the political integrity, economic security, health or welfare of the tribe.

This Court's "Decision" in *Strate* reaffirmed the continuing validity of *Montana*'s following actual presumption and limitation of a tribe's inherent sovereign powers:

* * *

> "Regarding activity on non-Indian fee land within a reservation, *Montana* delineated – in a main rule and exceptions – the bounds of the power tribes retain to exercise 'forms of jurisdiction over non-Indians'. *Id.*, [450 U.S.] at 565. As to non-members, we hold, a tribe's adjudicating jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding. Subject to controlling provisions in treaties and statutes and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'does not extend to the activities of non-members of the tribe'." Ibid. 117 S.Ct. 1413.

* * *

33 U.S.C. 1377(e) which permits EPA to grant tribes TAS status does *not* either specifically or by inference enlarge the scope of inherent tribal regulatory jurisdiction over non-tribal members on fee land.

The EPA policy for granting TAS status to tribes as well as EPA's above-described erroneous "initial presumption" upon which it is based are fatally flawed because they are based on the erroneous underlying presumption tribes possess the authority necessary to regulate non-tribal members rather than requiring a specific showing of direct, significant adverse impact on the tribe, or its members, required by *Montana* and *Strate*.

The *City of Albuquerque vs. Browner, supra* "Decision", authorizes tribal CWA regulation of non-tribal member activities *outside* the tribe's reservation, which is far in

excess of the *on-reservation* jurisdiction over non-tribal members considered and severely restricted by *Montana* and *Strate*.

Because of EPA's unwarranted extra territorial effect granted to tribal CWA regulations, this Court must, at a minimum, direct EPA to require tribes seeking TAS status establish by specific, credible evidence that EPA's failure to grant TAS status will directly, significantly, adversely affect the political integrity, economic security, health or welfare of the tribe.

The present EPA program for considering and granting TAS applications clearly fails to consider existing state and local regulations adopted pursuant to, or supplementing, the CWA in determining whether or not to grant a TAS application and, if an application is granted, the extent or scope of the tribe's regulatory authority.

Any determination of whether or not the *Montana* standards for tribal regulatory authority over non-tribal members have been satisfied must, however, consider existing state and local regulatory schemes. If existing state and local governments adequately regulate non-tribal member activities on reservation fee land and outside the reservation, there is no direct impact of non-tribal members activities on the tribe's political integrity, economic security, health or welfare and no basis for tribal CWA jurisdiction over non-tribal member activities on fee land within or outside the boundaries of the reservation.

In *Montana*, the State's prior, near exclusive regulation of hunting and fishing on fee land within the reservation was a factor considered by the Court in finding

regulation of that activity by the tribe was not required to protect the tribe's political integrity, economic security, health or welfare. 450 U.S. at 566-567.

Washington, like other states, has been actively involved in regulating and eliminating pollution causing activities pursuant to the CWA since 1973 through the enactment and enforcement of statutes and regulations. See: RCW Chap. 90.48, Washington Administrative Code Chap. 173-220 through 173-245. The substantial and significant regulatory activity of state and local governments including the Petitioner-irrigation districts herein is a factor which must be considered by the EPA in applying the *Montana* standards to determine whether or not, and to what extent, a tribe should be granted regulatory jurisdiction over the activities of non-tribal members on fee land within or outside the reservation.

CONCLUSION

The EPA erroneous policies and presumptions applied when EPA reviews and grants TAS applications pursuant to 33 U.S.C. 1377(e) which permit tribal regulation of non-tribal member activities both on fee land within and outside the reservation are contrary to this Court's well-established judicial standards for determining the extent of tribal jurisdiction over non-tribal members.

The Court is respectfully requested to grant the "Petition for Writ of Certiorari" in this case and review EPA's implementation of 33 U.S.C. 1377(e).

DATED: August 24, 1998

Respectfully submitted,

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APPENDIX

Confederated Tribes and Bands
of the Yakama Indian Nation

Established by the
Treaty of June 9, 1855

November 4, 1994

Mr. Chuck Clarke
Regional Administrator
US Environmental Protection Agency
1200 Sixth Avenue, SO-121
Seattle, WA 98101

Dear Mr. Clarke:

The Yakama Nation is in the process of developing Water Quality Standards for the Yakama Indian Reservation. Through this letter we would like to request your approval of our eligibility to administer the water quality standards and water quality certification programs under sections 303(c), 401 and 518 of the Clean Water Act.

We have previously been granted approval under the Treatment as a State process for Sections 106 and 314 of the Clean Water Act. The information submitted herein is intended to supplement the Section 106 Treatment as a State application submitted to Administrator Russell on September 6, 1989 and the Section 314 application originally submitted on February 21, 1991. As the information submitted on federal recognition and governmental duties and powers has not changed since those applications, they will not be further addressed in this letter. Supplemental information on jurisdiction and capability follows.

Jurisdictional Analysis

The Yakama Nation requests EPA approval to develop and administer water quality standards for all waters

which, in the course of nature or as a result of artificial works, diversion, or artificial streamflow enhancement, arise on, border, traverse or underlie the Yakama Reservation. These waters include all surface and ground waters, intermittent and ephemeral streams, springs, seeps, wetlands and other waters which lie within or form the exterior boundaries of the Yakama Indian Reservation. The standards will not apply to waters contained within wastewater ponds, lagoons or parts of wastewater treatment systems which are lined or constructed in such a manner that seepage into the ground or into surface waters will not occur.

Following adoption of the Yakama Nation Water Quality Standards a process will be initiated to grant water quality certifications, under guidelines established in section 401 and appropriate EPA regulations, for all waters covered under the approved water quality standards.

For purposes of these actions, the Yakama Reservation is defined to mean all lands within the exterior boundaries of the Yakama Indian Reservation as set forth in the *Treaty with the Yakamas, June 9, 1855* (12 Stat. 951, Appendix 3 – September 6, 1989 submission). These boundaries are delineated on the attached map. A list of major surface waterbodies to be covered under the Yakama Nation Water Quality Standards is also attached.

As noted above, the Yakama Nation is seeking authorization to administer the water quality standards and certification programs over all waters which arise on, border, traverse or underlie the Yakama Reservation, regardless of ownership of the land through which these waters flow or underlie. This assumption would be consistent

with the *Treaty with the Yakamas*, the Clean Water Act, and the federal and EPA Indian policies.

The legal analysis ("Analysis of Tribal Regulatory Authority over Water Pollution Sources within the Exterior Boundaries of the Yakima Indian Nation", September 6, 1989) submitted to Administrator Russell in 1989 presents the legal framework for the Yakama Nation's assertion of authority over all reservation waters. This analysis demonstrates the Yakama Nation's sovereign authority to protect the health and welfare of the Reservation population and the quality of the Reservation environment from the adverse effects of water pollution. In addition, we assert that, based on past experience and continued degradation of the quality of our reservation waters, impairment of reservation waters by both Indians and non-Indians will have a serious and substantial effect on the political integrity, economic security and the health and welfare of the Yakama Nation.

Federal environmental regulations were established to protect the public health and safety from activities which could have serious and substantial impacts to this country's citizens. More specifically, the Clean Water Act constitutes, in effect, a legislative determination that activities which affect surface water and critical habitat quality may have serious and substantial impacts. Similarly, water quality management on the Yakama Reservation serves the purpose of protecting public health and safety, a core governmental function critical to self-government and political integrity.

The Yakama Reservation lies within the Yakima and Klickitat River Basins. The quality of waters in both these

basins are impacted by agriculture, logging, grazing, residential and light industrial development and numerous other sources. These activities occur on both fee and trust lands and are conducted by both Indians and non-Indians. In addition, impacts are seldom restricted to the waters on the land parcel on which an activity occurs as water, fish, aquatic organisms, and wildlife can not recognize such property lines.

Examples of impacts to water quality on the Yakama Reservation are not difficult to site. Sedimentation and ground disturbance from logging, logging roads and associated practices have the potential to impact critical spawning beds, wetlands and native foods and medicines of great importance to the Yakama culture and the continued subsistence of the Yakama people. Degradation of wetlands, riparian habitat and meadow systems by grazing similarly impact the tribal water supply, critical aquatic life and wildlife habitat, spawning beds, fisheries habitat and native foods and medicines. Agricultural activities have introduced pesticides and fertilizers into the soils as well as into surface and ground water systems through leaching and run-off. These chemicals have been found to be accumulating in bottom sediments, spawning gravels, and fish consumed by the reservation population as well as being suspected of being transferred to birds and other wildlife through the food chain. We have recently dealt with two light industrial sites on the reservation in which drinking water supplies at several neighboring homes and a tribal longhouse have become contaminated. There are currently fourteen industries

and three cities/towns permitted to discharge waste-waters into reservation waters, thus assimilating those wastes into the reservation water system.

In none of these examples are the impacts limited to property owned by any one individual or respective of Indian and non-Indian property boundaries. Impacts to the fisheries and wildlife resources and to native foods and medicines are a direct assault on tribal culture and thus the political integrity of the Yakama Nation. Contamination of drinking water and the fish upon which many of the Yakama people rely for subsistence has a direct potential to lead to serious health impacts to the reservation population. Degradation of the quality of tribal waters also has the potential to limit uses and reduce the supply available for the economic needs of the Yakama Nation. Cumulatively, these impacts, whether caused by Indians or non-Indian and whether occurring on trust or fee lands, have the potential to cause serious and substantial impacts to the political integrity, the economic security and the health and welfare of the Yakama Nation. As such, the Yakama Nation has sufficient authority to regulate and manage water quality for all waters within the exterior boundaries of the reservation.

Tribal Capability

Previous "Treatment as a State" applications provide a background on the Nation's history in administering numerous programs. Over the last several years the Nation has continued to gain experience in natural resource management, setting an example for tribes, as well as state and federal agencies, in many areas. The

Department of Natural Resources and the Environmental Protection Program have continued to grow in size, expertise and experience, taking numerous steps to strengthen natural resource and water quality protection both on the reservation and within our ceded lands. It is under this department and program that our water quality standards and certification programs will be administered.

The implementation of our water quality standards and the issuance of 401 certifications will be the responsibility of a hydrologist/environmental scientist employed by the Environmental Protection Program utilizing funds through a Section 106 grant, supplemented by tribal funds as necessary. The position requires a minimum of a bachelor's degree in the natural or physical sciences and two years of relevant experience or a master's degree and one year of experience. This individual is selected and trained to be knowledgeable in the Clean Water Act, water quality standards and other environmental regulations. The Yakama Nation knows that these water quality standards will form the cornerstone of all water quality activities on the reservation and will place appropriate emphasis on providing support for the program and its activities.

Assistance with program implementation will come from other program and department staff, thus best utilizing the breadth of expertise employed by the Nation. The Environmental Protection Program currently employs two other water-related professionals and has four college students assisting with assessment projects during the summer. Each of these individuals are available for

consultation and input on decisions relative to the water quality standards.

The Yakama Nation also believes strongly in integrating an interdisciplinary approach to resource management. This will allow our hydrologist to consult with other hydrologists, hydrogeologists, fisheries and wildlife biologists, soil scientists, agricultural engineers, cultural specialists and other tribal experts when making decisions relative to water quality management and potential impacts to tribal resources. This approach also assists in maximizing the number of individuals aware of our regulations and thus the number available to observe and report potential violations to the standards. The experts are among the nearly 200 employees of the Department of Natural Resources and the technical staff of the Bureau of Indian Affairs, Yakama Agency. In addition, the program will be assisted by the Office of Legal Counsel, currently staffed by ten attorneys, and the other administrative/ support services provided by the Nation.

I hope that this information will be sufficient to allow you to determine our eligibility to administer the water quality standards and section 401 certification programs for the Yakama Indian Reservation. If you need additional information please do not hesitate to contact Ms. Jannine Jennings at (509) 865-5121.

Sincerely,
YAKAMA INDIAN NATION

Jerry Meninick, Chairman
Yakama Tribal Council

cc: YIN Roads, Irrigation & Land Committee
Carroll Palmer, Dept. of Natural Resources
Moses Dick Squeochs, Environmental Protection Program
Jannine Jennings, Environmental Protection Program
Betty Hamilton, YIN Office of Legal Counsel
Larry Brockman, EPA Indian Program
Marcia Lagerloef, EPA Water Quality Standards Coordinator
Rich McCalister, EPA Office of Regional Counsel

MAJOR RESERVATION WATERS TO BE INCLUDED IN YAKAMA NATION WATER QUALITY STANDARDS

(1) Yakima River

Yakima River from south reservation boundary/ Mabton – Sunnyside Bridge (RM 59.8) to the north reservation boundary/Ahtanum Creek (RM 106.9)

(2) Ahtanum Creek Basin

Ahtanum Creek
Ahtanum Creek, South Fork
Reservation Creek
Wapato Irrigation Project Waters

(3) Toppenish Creek Basin

Agency Creek
Branch Creek
Charley's Pond
Clock Creek
Corral Lake
Hunt Creek
Kingfish Creek
Latum Creek
Marion Drain
Mill Creek
Mud Lake
North Medicine Creek
Olney Lake
Rattlesnake Creek
Simcoe Creek
Simcoe Creek, North Fork
Simcoe Creek, South Fork
South Medicine Creek
Snake Creek
Toppenish Creek
Toppenish Creek, Middle Branch
Toppenish Creek, North Fork
Toppenish Creek, South Fork
Wahtum Creek

Wanity Slough
Wapato Irrigation Project Waters
White Deerk Creek
Willow Creek

(4) Satus Creek Basin
Bull Creek
Circle Lake
Cockleburr Lake
Corral Lake
Dry Creek
Dry Creek, Middle Fork
Dry Creek, North Fork
Dry Creek, South Fork
Fortyday Creek
Horseshoe Lake
Knockout Creek
Kusshi Creek
Logy Creek
Logy Creek, North Fork
Logy Creek, South Fork
Lousy Creek
McBrides's Lake
Mule Dry Creek
North Fork Logy Creek
Oak Creek
Round Lake
Satus Creek
Seattle Creek
Section Corner Creek
Shinando Creek
Slaughterhouse Lake
Spring Creek
Sumack Lake
Tadpole Lake
Teal Lake
Tenie Creek
Third Creek

Wapato Irrigation Project Waters
Warren Lake
White Fir Creek
Wilson Charlie Creek
Yatama Creek
Yatama Creek, South Fork

(5) Klickitat River Basin
Bacon Creek
Bear Creek
Bench Lake
Big Muddy Creek
Bird Creek
Bird Lake
Blue Creek
Bluff Lake
Brush Creek
Cedar Creek
Chaparral Creek
Clearwater Creek
Conboy Lake
Corral Creek
Cougar Creek
Coyote Creek
Crawford Creek
Cuitin Creek
Cunningham Creek
Dairy Creek
Dairy Creek, North Fork
Diamond Fork
Dry Creek
Elkhorn Creek
Featherbed Creek
Fish Lake
Fish Lake Stream
Fraiser Creek
Heart Lake
Hellroaring Creek

Hellroaring Irrigation Ditch
Hellroaring Irrigation District Waters
Holmes Creek
Howard Lake
Huckleberry Creek
Icksix Creek
Kinney Creek
Klickitat River from south reservation boundary/
Summit Creek (RM 37.3) to headwaters
Klickitat River, West Fork
LeConte Lake
Little Muddy Creek
McCreedy Creek
McCreedy Creek, East Fork
McCreedy Creek, Middle Fork
Meadow Creek
Mill Lake
Mirror Lake
Mosquito Creek
Mount Adams Lake
Outlet Creek
Panther Creek
Pearl Creek
Petross Creek
Pileup Creek
Piscoe Creek
Pole Creek
Potato Hill Lake
Rusk Creek
Schafer Creek
Sheep Creek
Snowplow Lake
Soda Spring Creek
Summit Creek
Surveyors Creek
Swamp Creek
Tepee Creek

Trappers Creek
Trout Creek
Twentyfivemile Creek
Two Lakes, Lower
Two Lakes, Upper
White Creek
White Creek, West Fork
Yedlick Creek

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SUPREME COURT, U.S.

No. 97-1929

In the Supreme Court of the United States

OCTOBER TERM 1997

STATE OF MONTANA, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Environmental Protection Agency (EPA) violated Section 1377(e) of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, which requires EPA to develop and implement "final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter," 33 U.S.C. 1377(e), by determining that the respondent Tribes should be authorized to establish water quality standards for non-Indian fee lands as well as Indian lands within the Flathead Reservation, based on a determination that water pollution from nonmember activities on non-Indian lands would have serious and substantial impacts on the health and welfare of the Tribes.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 137 F.3d 1135. The opinion of the district court (Pet. App. 16a-49a) is reported at 941 F. Supp. 945.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1998. The petition for a writ of certiorari was filed on May 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Congress has authorized the Environmental Protection Agency (EPA) to treat Indian Tribes in the

same manner as States for certain purposes of the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and has directed EPA to promulgate regulations "which specify how Indian Tribes shall be treated as States" for those purposes. 33 U.S.C. 1377(e) (Pet. App. 132a-133a). Following notice and comment, the EPA promulgated regulations that provide a mechanism for Tribes to receive "treatment as a State" (TAS) authority. See 40 C.F.R. 131.8 (Pet. App. 113a-117a). The Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSK Tribes) applied for and received TAS authority under those regulations. Pet. App. 50a-91a. Petitioners, the State of Montana and local governmental entities, brought this action in the United States District Court for the District of Montana to obtain a declaratory judgment that EPA's grant of TAS status to the Tribes is unlawful. The district court rejected petitioners' assertions that EPA's decision is invalid as a matter of law, *id.* at 16a-49a, and the court of appeals affirmed, *id.* at 1a-15a.

1. The CWA is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of the discharge of pollutants into those waters. 33 U.S.C. 1251(a). To achieve those goals, the CWA establishes a partnership between the federal government and the States in which the States have "primary responsibilities and rights" to regulate water pollution. 33 U.S.C. 1251(b); see 33 U.S.C. 1370; *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992). As we explain below, Congress has also extended this partnership to Indian Tribes by providing, through Section 1377(e) of the CWA, that Indian Tribes satisfying prescribed criteria are eligible

for treatment in the same manner as States for certain purposes under the CWA. See 33 U.S.C. 1377(e).

a. As part of its regulatory program, the CWA provides that each State must adopt water quality standards for all waters within the State's jurisdiction and submit those standards to EPA for approval. 33 U.S.C. 1313(c). States must specify one or more designated "uses" of each waterway (*e.g.*, public water supply, recreation, fish propagation, or agriculture) and must establish water quality criteria to protect those uses. 33 U.S.C. 1313(c)(2)(A). EPA reviews all new or revised state water quality standards for consistency with the requirements of the Act. 33 U.S.C. 1313(c)(3). If EPA determines that a state standard does not meet minimum federal requirements, then EPA disapproves the standard. The State may then adopt changes suggested by EPA, or failing such action, EPA must itself issue a water quality standard for the State. 33 U.S.C. 1313(c)(3) and (4)(A).

In addition to water-quality based requirements, the CWA also provides for technology-based requirements, which take into account the capability of existing pollution-control technologies to remove particular pollutants from effluents. EPA or the State may establish effluent limitations, reflecting technology-based requirements for discrete categories and classes of point sources, that restrict the quantities, rates, and concentrations of specified pollutants that may be discharged into water from the point sources. See 33 U.S.C. 1311, 1342.

Both water quality-based and technology-based requirements are implemented through a permit process, known as the National Pollutant Discharge Elimination System (NPDES). The Act prohibits "the discharge of any pollutant" into the nation's waters except as au-

thorized by an NPDES permit. 33 U.S.C. 1311, 1342; see *EPA* v. *California*, 426 U.S. 200, 205 (1976). All NPDES permits must include effluent limitations (*i.e.*, restrictions on qualities, rates, and concentrations of discharged pollutants) that require the permittee's adherence to technology-based standards and, where applicable, more stringent water quality-based limitations designed to ensure that the receiving waters attain and maintain state water quality standards. See 33 U.S.C. 1342(a)(1); 40 C.F.R. 122.4(d); *Arkansas*, 503 U.S. at 104-107.

b. Federal law generally prohibits States from exercising regulatory authority on Indian lands unless Congress has authorized such action. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 & n.18 (1987). As originally enacted, the CWA did not specifically identify any non-federal governmental entity that had authority to set standards for waters on Indian lands within States. Congress amended the CWA in 1987 to provide that EPA may treat qualifying Indian Tribes in the same manner as States for the purposes of, inter alia, setting water quality standards for surface waters within the exterior boundaries of their reservations. 33 U.S.C. 1377(e). See Water Quality Act of 1987, Pub. L. 100-4, Tit. V, § 506, 101 Stat. 76. Section 1377(e) states that EPA is authorized to "treat an Indian Tribe as a State" for the purposes of 33 U.S.C. 1313 if:

> (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers;
>
> (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian Tribe,

> held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of any Indian reservation; and
>
> (3) the Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.

33 U.S.C. 1377(e). The term "Federal Indian reservation" is defined for those purposes to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. 1377(h)(1). Section 1377(e) directs EPA to promulgate regulations "which specify how Indian tribes shall be treated as States for purposes of this chapter" and to provide a mechanism for resolving disputes between States and Indian Tribes located on common bodies of water. 33 U.S.C. 1377(e).

2. In accordance with Section 1377(e)'s directions, EPA has promulgated regulations for the treatment of Indian Tribes in the same manner as States. See 40 C.F.R. 131.8 (Pet. App. 113a-117a). EPA's regulations set out four criteria, embodying the statutory requirements of Section 1377, that an applicant must meet to receive TAS authority. See 40 C.F.R. 131.8(a) (Pet. App. 113a-114a).

First, the applicant must be a federally recognized Indian Tribe that exercises governmental authority over a federal Indian reservation. 40 C.F.R. 131.8(a)(1), 131.3(k) and (l); compare 33 U.S.C. 1377(e)(1) and

(h). Second, the Indian Tribe must have a governing body that carries out "substantial governmental duties and powers." 40 C.F.R. 131.8(a)(2); compare 33 U.S.C. 1377(e)(1). Third, the water quality standards program that the Indian Tribe seeks to administer must pertain to the management and protection of water resources that are on Indian lands or otherwise within the borders of the Indian reservation. 40 C.F.R. 131.8(a)(3); compare 33 U.S.C. 1377(e)(2). Fourth, the Indian Tribe must reasonably be expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Clean Water Act and the relevant regulations. 40 C.F.R. 131.8(a)(4); compare 33 U.S.C. 1377(e)(3).

EPA's regulations also set out the procedural requirements that Indian Tribes must follow to apply for and obtain TAS authority. 40 C.F.R. 131.8(b) and (c) (Pet. App. 114a-117a). The Tribe must submit a detailed application to the EPA Regional Administrator demonstrating that the Tribe satisfies the prescribed criteria for TAS status. 40 C.F.R. 131.8(b). The Regional Administrator provides notice of a Tribe's application to all appropriate governmental entities and allows 30 days for the submission of comments on the Tribe's assertion of authority. 40 C.F.R. 131.8(c)(2)(ii)and (c)(3). The Regional Administrator then determines, based on the Tribe's application and public comments, whether the Tribe "has adequately demonstrated that it meets the requirements" for treatment in the same manner as a State. 40 C.F.R. 131.8(c)(4).

EPA's regulations do not specifically address when a Tribe may exercise authority pertaining to water resources that pass through or are adjacent to lands owned by nonmembers in fee within the borders of an

Indian reservation. That issue arose, however, in comments during the rulemaking. See 56 Fed. Reg. 64,876 (1991). See Pet. App. 97a. EPA observed in the preamble to the final regulations, in response to those comments, that the Supreme Court had recognized that an Indian Tribe may have "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Pet. App. 98a, quoting *Montana* v. *United States*, 450 U.S. 544, 566 (1981). EPA therefore decided that, in implementing Section 1377(e), it would examine the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Pet. App. 98a.

EPA stated that "the ultimate decision regarding Tribal authority must be made on a Tribe-by-Tribe basis," Pet. App. 99a, and the "extent of such tribal authority depends on the effect of th[e] activity on the tribe," *id.* At 100a. EPA determined that, as a matter of prudence and in light of uncertainty over the scope of Indian authority over nonmembers, it would proceed for the time being on the premise (which EPA termed an "interim operating rule") that the Tribe should be required to show that the "potential impacts of regulated activities on the tribe are serious and substantial." *Id.* at 101a. But EPA also observed that "the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare." *Ibid.* It ultimately concluded that "[t]he determination as to whether the required effect is present in a particular case depends on the circumstances." *Ibid.*

3. The CSK Tribes applied to EPA for TAS authority for the purpose of developing water quality standards for all surface waters within the boundaries of the Flathead Reservation in Montana. See Pet. App. 17a. Those waters supply domestic, industrial, recreational, and agricultural uses, and support fish and other wildlife, on land within the Reservation. After seeking comments from Montana and other appropriate governmental entities, EPA issued a decision that approved the CSK Tribes' application and authorized the Tribes to administer a water quality standards program for all surface waters within the boundaries of the Reservation, *id.* at 50a-91a, including waters on or adjacent to fee lands, *id.* at 62a-68a. EPA based its decision on specific findings respecting the impact of water pollution on tribal health and welfare, including the impact from non-member activities on fee lands within the Reservation. See *id.* at 62a-68a, 70a-91a. EPA has since approved the water quality standards submitted by the Tribes, which are similar to those that the State of Montana has set for waters within its jurisdiction. *Id.* at 18a & n.1. In accordance with 33 U.S.C. 1341(a) and the CSK Tribes' TAS status, EPA will not issue an NPDES permit for a point source discharge within the Reservation if the CSK Tribes deny certification that the discharge will comply with the Tribes' water quality standards.

4. Petitioners filed a complaint under Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, challenging EPA's decision to grant the CSK Tribes TAS status. Pet. App. 19a. Petitioners contended that EPA erred as a matter of law in granting the Tribes TAS status because the agency's decision rested on a mistaken understanding of this Court's cases describing the scope of a Tribe's authority over

the activities of nonmembers who occupy fee lands within the Reservation. *Id.* at 20a. The district court granted summary judgment to EPA and the Tribes, finding that "EPA's final decision is supported by the administrative record, consistent with EPA's regulations, and not contrary to law, and should be upheld." *Id.* at 48a.

5. The court of appeals affirmed. Pet. App. 1a-15a. The court rejected what it described as petitioners' "facial challenge" to EPA's regulations. Petitioners argued that "the regulations permit tribes to exercise authority over non-members that is broader than the inherent tribal powers recognized as necessary to self-governance." *Id.* at 3a, 4a. In particular, the court of appeals explained, petitioners' "position in the district court and in this court has been that EPA got the scope of inherent authority wrong, and that the Tribes should be able to engage in nonconsensual regulation of non-tribal entities only when all state or federal remedies to alleviate threats to the welfare of the tribe have been exhausted and have proved fruitless." *Id.* at 10a. The court of appeals concluded that petitioners' argument rested on a misreading of this Court's decisions in *Montana* v. *United States*, *supra*, *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, *supra*, and *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404 (1997). Pet. App. 11a-13a. The court of appeals "affirm[ed] the district court's decision that EPA's regulations pursuant to which the Tribe's TAS authority was granted are valid as reflecting appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members." *Id.* at 13a.

ARGUMENT

The petition for a writ of certiorari should be denied because (1) the petition seeks review of an issue that was not briefed or decided below; (2) the court of appeals correctly decided the issue that was before it; and (3) the court of appeals' decision does not conflict with any decision of another court of appeals or otherwise present an issue warranting this Court's review.

1. The sole question presented in the petition for a writ of certiorari is whether an Indian Tribe has "inherent regulatory authority over a State and its local governments with respect to discharges into streams and other bodies of water from fee-owned land within the exterior boundaries of the tribe's reservation." Pet. i. The body of the petition, however, devotes less than two pages to that question, see Pet. 18-19, and that question does not fairly reflect the issue that petitioners appealed, the parties briefed, and the court of appeals decided.

This case arose from EPA's decision to grant the CSK Tribes TAS status, in accordance with Section 1377(e) of the CWA and EPA regulations implementing that provision, for purposes of establishing water quality standards for water resources within the Tribes' Reservation. See Pet. App. 17a-19a, 50a-91a. Petitioners have not challenged EPA's basic determination that, when considering whether Indian Tribes should have TAS status for the purpose of setting water quality standards for waters that flow through or adjacent to fee lands within the Reservation, EPA will use as its benchmark this Court's decisions in *Montana* v. *United States*, 450 U.S. 544 (1981), and subsequent cases, which describe the general principles defining the scope of a Tribe's authority in other settings to

regulate the activities of nonmembers on fee lands within the Tribe's reservation. See *Montana*, 450 U.S. at 565-566; see also *Strate* v. *A-1 Contractors*, 117 S. Ct. 1404, 1409 (1997); *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 429-430 (1989) (plurality opinion).

The Court's decision in *Montana* recognizes that Tribes as a general rule lack inherent authority to regulate nonmembers, but that the rule is subject to important exceptions. In particular, the Court stated:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. at 566. EPA has concluded from that passage, and its application in subsequent Supreme Court decisions, that a Tribe may exercise inherent civil regulatory authority over the activities of nonmembers within a reservation if the direct effects of the activities "on the political integrity, the economic security, or the health or welfare of the tribe" are "serious and substantial." Pet. App. 63a. Pursuant to its decision to apply that same general approach in determining whether and to what extent an Indian Tribe should be treated as a State pursuant to the express statutory authorization in 33 U.S.C. 1377(e), EPA concluded in this case that the CSK Tribes should be permitted to set water quality standards under the CWA that would apply to waters that pass through or are adjacent to fee lands within their Reservation. EPA specifically found, based on detailed evidence in the administrative record, that the water pollution from non-member activities on

those lands would have serious and substantial impacts on the health and welfare of the Tribes. Pet. App. 70a-91a.

Petitioners have not challenged EPA's finding of serious and substantial impacts,[1] or argued that EPA's treatment of the CSK Tribes as a State with respect to lands owned by nonmembers should have been narrower in scope. Instead, they have consistently contended—in the administrative proceedings (Pet. App. 64a-65a), in the district court (*id.* at 42a-43a), and in the court of appeals (*id.* at 10a-11a)—that EPA has misinterpreted *Montana*, *Brendale*, and related decisions. Petitioners have specifically argued that "the *Brendale* decision effectively repudiated the *Montana* standard." Pet. App. 10a-11a. See *id.* at 42a. EPA, the district court, and the court of appeals have all unanimously rejected that argument. See *id.* at 10a-13a, 42a-46a, 64a-65a.

Thus, the question petitioners present in this Court, which suggests that the court of appeals granted the CSK Tribes broad authority to regulate state and local governmental activities, does not accurately depict the quite different issue decided below. The court did not frame the issue as whether the CSK Tribes were entitled to exercise "regulatory authority over a State and its local governments." Pet. i. Indeed, the courts below understood that EPA has retained responsibility for issuing NPDES permits, and EPA has not yet taken

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[1] The State submitted no data to EPA to rebut the CSK Tribes' showing of serious and substantial effects on tribal interests. Pet. App. 63a-64a.

any action to enforce permitting requirements on nonmember fee lands. See Pet. App. 5a, 21a-22a.[2]

2. a. The court of appeals correctly decided the issue that was before it. The CWA leaves no doubt that Congress intended to authorize EPA to treat an eligible Tribe in the same manner as a State with respect to lands owned in fee by non-Indians within the Tribe's reservation. Thus, Section 1377(e)(2) provides that Indian Tribes may qualify for treatment "as a State" for certain CWA purposes, not only with respect to land held by or on behalf of the Tribe or its members, but also with respect to land that is "otherwise within the borders of" the Tribe's "reservation." 33 U.S.C. 1377(e)(2).[3] Congress accordingly recognized, in enacting the

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[2] The court of appeals had no occasion to address the permitting issues because they are not ripe. In addition, the court of appeals had no reason to address petitioners' distinction between governmental entities and other nonmembers because petitioners did not raise it in their motion for summary judgment and they therefore did not properly preserve that distinction for purposes of appeal. See Federal Appellees' C.A. Br. 42 n.20; see Pet. App. 9a (stating that petitioners "opposed granting the Tribes TAS status to the extent such status would extend to reservation lands and surface waters owned in fee by non-members of the Tribe").

[3] Moreover, Section 1377(h) defines the term "Federal Indian reservation" to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. 1377(h). This definition is essentially the same as the description of a reservation in the definition of "Indian country" in 18 U.S.C. 1151, which the Court has consistently held, prior to the enactment of Section 1377 in 1987, "include[s] lands held in fee by non-Indians within reservation boundaries." *Solem* v. *Bartlett*, 465 U.S. 463, 468 (1984); see, *e.g.*, *Seymour* v. *Superintendent*, 368 U.S. 351, 358 (1962); *United States* v. *Mazurie*, 419 U.S. 544, 555 (1975); *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463,

Water Quality Act of 1987, that a Tribe's "management and protection of water resources" (33 U.S.C. 1377(e)(2)) could extend to waters that run through or adjacent to fee lands within the reservation, and EPA reasonably looked to this Court's decisions for guidance on the question of when it should authorize Tribes to exercise authority affecting nonmember activities on fee lands. Pet. App. 62a. The court of appeals sustained EPA's application of the principles of *Montana* and its progeny, under which EPA has authorized a Tribe to administer a water quality standards program that includes the activities of nonmembers within the Reservation if the direct effects of the activities "on the political integrity, the economic security, or the health or welfare of the tribe" are "serious and substantial." *Id.* at 62a-63a. Cf. *Brendale*, 492 U.S. at 431 (impacts must be "demonstrably serious") (plurality opinion).

b. Petitioners argue that, in accepting EPA's application of the *Montana* line of cases, the court of appeals failed to give appropriate weight to this Court's decisions in *Strate* and *Brendale*. Pet. 10-16. There is no merit to that argument. Those cases provide instructive guidance on how to apply *Montana* in particular contexts involving inherent authority, but—contrary to petitioners's suggestion— they do not alter *Montana*'s basic test for assessing whether a Tribe may exercise authority over a nonmember on fee lands, much less suggest that EPA's administrative decision applying the general principles of *Montana* on

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478-479 (1976). For that reason, the basic thrust of petitioners' position—that EPA is essentially barred from treating a Tribe as a State under the CWA with respect to reservation lands owned in fee by non-Indians—cannot be squared with the well-understood language Congress chose to use in authorizing EPA to confer certain responsibilities on Tribes under Section 1377.

the record before it in implementing an Act of Congress should be set aside under the APA's deferential standard of review. Indeed, *Strate* identified *Montana* as the "pathmarking case concerning tribal civil authority over nonmembers" and affirmed the *Montana* test verbatim. 117 S. Ct. at 1409. Justice White's plurality opinion in *Brendale* also acknowledged the *Montana* test, suggesting additionally that the Tribe may exercise authority over nonmembers only if the impact on the identified tribal interests is "demonstrably serious." *Brendale*, 492 U.S. at 431. In this case, EPA found that the impacts are "serious and substantial." Pet. App. 70a-91a.

c. Petitioners also make a more specific argument —that *Strate* and *Brendale* place an implicit limitation on tribal authority over nonmembers based on the availability of non-tribal remedies. According to petitioners, those cases, coupled with a footnote in the *Montana* decision (450 U.S. at 566 n.16), indicate that *Montana* allows a Tribe to exercise authority over nonmembers only if there is no state or federal remedy available to protect the particular tribal interest at issue. See Pet. 13-17. The court of appeals correctly rejected that argument, which finds no support in *Montana*, *Brendale*, or *Strate*. Pet. App. 10a-12a.

Montana addressed the question whether Indian Tribes have inherent authority to regulate nonmember fishing and hunting on fee lands within a reservation. 450 U.S. at 547. The Court determined that the Tribe lacked that authority in the circumstances presented because the Tribe failed to show that the nonmember activity would harm the Tribe's political or economic security in the sense that the activities threatened the "subsistence or welfare of the Tribe." *Id.* at 566. The Court observed, in a footnote, that the Tribe also did

not allege that the State had misused its regulatory authority to the detriment of the Tribe. *Id.* at 566 n.16.[4] Contrary to petitioners' suggestion (Pet. 13), that footnote merely indicates that the State's failure to manage nonmember activities may itself create a threat to the Tribe's political integrity, economic security, or health or welfare that would warrant a Tribe's taking regulatory action. See *Lower Brule Sioux Tribe* v. *South Dakota*, 104 F.3d 1017, 1023 (8th Cir.), cert. denied, 118 S. Ct. 64 (1997). It does not by its terms or by any reasonable implication indicate that "a tribe's recourse normally lies in pursuing available state and federal remedies to mitigate the alleged infringement on tribal interests" (Pet. 13).

Petitioners are also mistaken in suggesting that the Court's decision in *Brendale* modifies the *Montana* test by adding the requirement that the adequacy of state or federal remedies must be considered in determining the scope of inherent tribal authority. See Pet. 11-13, citing 492 U.S. at 429-430. *Brendale*, which involved a dispute over a Tribe's power to zone fee land owned by nonmembers, produced three opinions, none of which garnered a majority. See 492 U.S. at 414 (opinion of White, J.); *id.* at 433 (opinion of Stevens, J.); *id.* at 448 (opinion of Blackmun, J.). The passages that petitioners

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[4] Footnote 16 states:

> Similarly, the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, has established its season, bag, or creel limits in such a way as to impair the [Tribe's] treaty rights to fish or hunt, or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State.

450 U.S. at 566.

cite from Justice White's plurality opinion (Pet. 12) and from Justice Stevens' opinion (Pet. 13-14) do not in any way suggest that tribal authority turns on the absence of federal or state remedies. See Pet. App. 11a ("Moreover, in Justice White's and Stevens' opinions, upon which [petitioners] rel[y], there is no suggestion that inherent authority exists only when no other government can act.").

Petitioners are additionally mistaken in suggesting (Pet. 14-16) that *Strate* supports such a test. *Strate* held that a tribal court lacked jurisdiction over a tort case arising from a traffic accident between nonmembers on a state highway. The Tribe had an interest in the dispute because the accident occurred on the portion of the highway built on a federally granted right-of-way across Indian reservation land. 117 S. Ct. at 1415. The Court concluded that the *Montana* test nevertheless was not satisfied because tribal jurisdiction over an accident involving only nonmembers was not "crucial to the 'political integrity, the economic security, or the health or welfare of the [Tribe]'" and was not necessary to protect tribal self-government. *Id.* at 1416. The Court noted that a state judicial forum was available to resolve the dispute, *ibid.*, but it did not suggest that the absence of such a forum would be a precondition for tribal jurisdiction.

In any event, the question here is not when inherent tribal authority over nonmembers should be recognized by a court in the absence of an Act of Congress. Rather, the question is whether EPA reasonably construed and applied an Act of Congress in the circumstances of this case. The CWA does not set forth any such rigid precondition to EPA's treatment of a Tribe in the same manner as a State, and EPA did not

act unreasonably in refraining from imposing one by implication.

d. Petitioners also argue that the Tribes should not be allowed to exercise authority over nonmembers because Montana's water quality laws have not "been preempted with respect to nonmember activities on fee lands on the Reservation." Pet. 17. The question of preemption, however, has no bearing on this case. This case arises from an APA challenge to an agency's action in implementing a federal statute. In assigning EPA the responsibility to determine when Tribes should have TAS authority to establish reservation-wide water quality standards, Congress recognized that a system of "checkerboard" state and tribal water quality standards could undermine the water quality of Indian reservations. See 33 U.S.C. 1377(e); Pet. App. 102a-103a. EPA reasonably looked to this Court's precedents respecting inherent tribal authority over nonmembers in other settings in determining when Tribes should be permitted, under the express statutory authorization in Section 1377(e), to issue water quality standards for CWA purposes that affect waters that pass through or are adjacent to fee lands. EPA then reasonably applied principles from those precedents to decide, based on the administrative record, whether the particular Tribe in this case should be granted certain federal statutory TAS authority.

3. Not only is the court of appeals' decision correct; it also does not conflict with any decision of another court of appeals. Indeed, it is fully consistent with the only other appellate decision addressing an EPA authorization of an Indian Tribe to establish water quality standards. There, the Tenth Circuit upheld EPA's approval of tribal water quality standards and held that EPA had properly incorporated those standards into an

NPDES permit issued to the City's waste treatment facility, which discharged into the Rio Grande at a point above the reservation. *City of Albuquerque* v. *Browner*, 97 F.3d 415, 419, 425-426 (10th Cir. 1996), cert. denied, 118 S. Ct. 410 (1997). The court concluded that EPA's authorization of the Tribe to establish water quality standards for purposes of the CWA "is in accord with powers inherent in Indian tribal sovereignty." *Id.* at 423. See Pet. App. 13a ("Our decision is fully consistent with the only other circuit opinion that has yet considered the issue of tribal authority to set water quality standards.").

While failing to mention the *City of Albuquerque* decision, petitioners appear to concede that the court of appeals' decision does not conflict with any decision of another court. Pet. 18. They contend, however, that this Court's review is warranted because the case has broad significance "with respect to future application of the [CWA]'s TAS provision" and "in other situations where the second *Montana* exception is relied upon as a basis for the exercise of inherent tribal authority over nonmembers." Pet. 20. Those contentions, however, do not provide a basis for this Court to exercise its certiorari jurisdiction.

First, EPA has recognized that the question whether a Tribe should be permitted to exercise TAS authority in setting water quality standards must be made "on a Tribe-by-Tribe basis" and depends on the particular circumstances in each case. Pet. App. 99a-100a. As the record in this case demonstrates, EPA conducts a careful inquiry into the particular water resources and land ownership patterns on each reservation. *Id.* at 70a-91a. Petitioners have not challenged below, or even addressed in their petition, EPA's factual findings respecting the Flathead Reservation. Hence, even if it

were this Court's practice to provide guidance on a technical regulatory issue that has generated no conflict among the courts of appeals, this case would be a particularly poor vehicle for addressing EPA's application of the CWA's TAS provisions.

Second, this case has limited precedential value outside of the specific regulatory context here. This case does not involve the judicial articulation of standards governing a Tribe's own assertion of inherent tribal authority over nonmembers on a reservation. Rather, it arises under an Act of Congress that expressly provides for a Tribe to be treated as a State for specified statutory purposes with respect to fee lands within the borders of a State and assigns to a federal administrative agency the responsibility to interpret and apply the statutory provisions in the context of a complex regulatory program. As we have explained, EPA has looked to this Court's precedents respecting inherent tribal authority for guidance on how to carry out its responsibilities under Section 1377(e). EPA has developed principles, by drawing on those cases, for the specific purpose of determining how to implement the congressional directive respecting tribal authority under the CWA. Those principles articulated by EPA, however, have no operative force outside of their regulatory context. Furthermore, EPA has indicated that its treatment of tribal authority issues arising from TAS applications is not set in stone and that it will continue to examine those applications in light of the Supreme Court's evolving case law. Pet. App. 100a. Hence, there is no basis for concluding that this case will have substantial impact in other unrelated situations involving Indian tribal authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; LAKE COUNTY, MONTANA; CITY OF RONAN, MONTANA, a municipal corporation; TOWN OF HOT SPRINGS, MONTANA, a municipal corporation,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, an agency of the United States; CAROL M. BROWNER, Administrator of the United States Environmental Protection Agency; CONFEDERATED SALISH and KOOTENAI TRIBES OF THE FLATHEAD RESERVATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The issue presented here is whether Respondent Confederated Salish and Kootenai Tribes [Tribes] have the inherent authority to regulate Petitioners' fee land wastewater discharge activities and thereby condition the latter's ability to secure National Pollution Discharge and Elimination System permits on compliance with tribal water quality standards. Respondent Environmental Protection Agency [EPA] found such authority in concluding that the Tribes should be treated as a State under § 518 of the Clean Water Act [CWA]. 33 U.S.C. § 1377 (Pet. 130a). EPA defended its decision before the lower courts on the basis of its interpretation of federal common law, and its suggestion that this issue was not presented below is unaccountable if only because that was precisely the question resolved by the Court of Appeals.

More understandable is EPA's shift in litigation position that attempts to recast the issue from whether the Tribes have the requisite inherent authority to whether the agency properly "looked to" this Court's inherent authority precedent in "reasonably" construing § 518. (Br. Fed. Resp't Opp'n [Fed. Opp'n] at 18, 20.) EPA has changed position because its prior one is untenable. The important question concerning the scope of an Indian tribe's inherent authority that *was* litigated below and *was* decided by the Court of Appeals should be resolved now by this Court.

ARGUMENT

I. THE ISSUE IN THIS CASE IS THE SCOPE OF INHERENT TRIBAL AUTHORITY AND EPA'S MISAPPLICATION OF THE STANDARDS THAT DETERMINE SUCH AUTHORITY.

EPA's initial contention that "the petition seeks review of an issue that was not briefed or decided below"

(Fed. Opp'n at 10) is simply wrong. Petitioners' formulation of the question presented makes clear that the entities over which tribal authority is asserted are a State and several of its political subdivisions. The question's phrasing is squarely consistent with the issue litigated and decided below – i.e., whether the Tribes' inherent powers extended to regulation of Petitioners' discharge activities from lands owned by them. Aside from being governmental entities, Petitioners are also nonmembers, and the question presented thus necessarily includes the antecedent question of whether the Tribes' inherent authority extends to *any* nonmember. Were the issue different, the Court of Appeals would not have defined the controversy as one over "the scope of inherent tribal authority" (Pet. 11a) and then resolved the dispute by reference to its interpretation of the second exception in *Montana v. United States*, 450 U.S. 544, 566 (1981), *id.*, 9a-13a.

EPA's related argument that Petitioners did not raise the distinction between individual nonmembers and governmental entities below is likewise incorrect. (Fed. Opp'n at 13 n.2.) Petitioners clearly maintained that their governmental status is material to the question whether the second *Montana* exception should be construed to permit their regulation by the Tribes. (Appellants' Open. Br. at 39-40; Appellants' Reply Br. at 8-9.) EPA further specifically acknowledged before the Court of Appeals that "the State raised this issue in its complaint." (Fed. Appellees' Br. at 42 n.20.) That the Court of Appeals failed to discuss this issue presumably meant only that it concluded the status of the regulated entity was irrelevant under its broad-brush application of *Montana*.

II. EPA'S REVISED POSITION ON THE MERITS IS INCONSISTENT WITH ITS 1991 REGULATIONS AND THE STRUCTURE OF THE CWA.

In an effort to divert focus from the inherent authority question and to portray this matter as involving little more than a "technical regulatory issue" (Fed. Opp'n at

20; *see also* Resp. Confed. Salish & Kootenai Tribes' Opp'n [Tribes' Opp'n] at 4-5), EPA makes an important shift in position. EPA now contends that, in enacting § 518, Congress authorized it to confer CWA program responsibilities on tribes with respect to all lands within an Indian reservation (Fed. Opp'n at 13, 20; *see also* Tribes' Opp'n at 6 n.4) and that, in exercising such authority, the agency decided it would look to this Court's case law for "guidance." (Fed. Opp'n at 14; *see also id.* at 10 ("benchmark"); *id.* at 20 ("guidance"). With this new argument EPA apparently suggests that the source of regulatory authority being exercised by a tribe when acting as a "State" under § 518 is something *other* than its inherent authority. Since tribal authority must be either delegated or inherent, EPA effectively asserts it is the former, not the latter, under § 518. *See, e.g., Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195-96, 208 (1978). This new theory is unavailing for at least two reasons.

First, EPA's fresh position flatly contradicts its prior writings on the subject. In the 1991 rulemaking that lies at the heart of this case, EPA concluded that § 518(e) was ambiguous and that

> Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of federal Indian law.

(Pet. 111a.) That the Court of Appeals viewed inherent authority as the dispositive question accordingly was to be expected, since EPA maintained consistently before the lower courts that such authority was a condition precedent to "State" status under § 518. (Fed. Appellees' Br. at 25-26) ("Because it determined that Congress had not clearly delegated to tribes federal authority over the activities of nonmembers in section 518, EPA determined that it would require tribes to demonstrate inherent authority to be eligible for approval of a reservation-wide water quality standards program"). The agency cannot

now change that administrative interpretation and the very basis for the challenge to its treatment-as-a-State determination. *See, e.g., Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 651-52 (1990); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 631 n.31 (1980).

Second, EPA's 1991 interpretation of § 518 is consistent with the overall structure of the CWA, while its newly-coined view is not. No provision of the CWA *delegates* authority to States. The CWA instead merely authorizes EPA to grant regulatory primacy to States by deferring the exercise of federal power. *See, e.g., California v. United States Dep't of Navy*, 845 F.2d 222, 225 (9th Cir. 1988) ("[S]tate permit programs [under CWA] are 'not a delegation of Federal authority,' but instead are state programs which 'function[ ] in lieu of the Federal program' " (quoting H.R. Rep. No. 830, 95th Cong., 1st Sess. 104 (1977), 1977 U.S.C.C.A.N. 4327, 4479)); *cf. United States Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) (penalties assessed under an EPA-approved state NPDES program do not "arise under" federal law). Thus, interpreting § 518(e) to expand the scope of tribal authority through legislative mandate would treat tribes very *differently* from, and not as, "a State." Just as it is unlikely that Congress would have made "a change as important as an expansion of Indian authority to regulate nonmembers" (Pet. 111a) without doing so "through statutory language and discuss[ing] the change in the committee reports" (*id.*), so too it is unlikely that Congress would alter the structure of the CWA through silence or by implication.

III. EPA DOES NOT EXPLAIN HOW AN INDIAN TRIBE'S SOVEREIGN INTERESTS CAN BE JEOPARDIZED BY NONMEMBER ACTIVITIES THAT ARE EFFECTIVELY REGULATED BY THE STATES OR THE FEDERAL GOVERNMENT.

In an effort to cast Petitioners' position as extreme, EPA quotes the Court of Appeals for the proposition that

"Petitioners have specifically argued that '[*Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989)] effectively repudiated the *Montana* standard.' " (Fed. Opp'n at 12, *quoting* Pet. 10a-11a.) Petitioners, however, never suggested that *Brendale* "repudiated" *Montana*. They instead argued that the second *Montana* exception does not apply where nontribal remedies exist to address the alleged infringement of a protectable federal interest. Petitioners' position in this regard is grounded in *Montana* itself (450 U.S. at 566 n.16) and in Justice White's plurality opinion in *Brendale*. 492 U.S. at 430-31; *see also id.* at 460 (Blackmun, J., concurring in part & dissenting in part) ("Justice White's opinion fashions a new-fangled federal nuisance-type cause of action").

This Court's decision in *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997), which was issued after regular briefing had concluded before the Court of Appeals, merely confirmed Petitioners' understanding of the second exception. *Strate* unequivocally teaches that where nonpreempted state remedies exist, the "optional use" (117 S. Ct. at 1416) of tribal law is unnecessary to protect a tribe's ability to govern itself or to order its internal affairs. This result, of course, obviates the need to resort to the drastic step of allowing an Indian tribe to exercise nonconsensual authority over the conduct of persons who are unable to participate as a matter of right in tribal political processes. *See, e.g., Duro v. Reina*, 495 U.S. 676, 694 (1990); (*see also* Br. Amici National Water Resources Ass'n et al. at 17.) More important from Petitioners' standpoint, such a result also obviates the need to take the startling and unprecedented step of countenancing extra-constitutional tribal regulatory powers over a State and its political subdivisions – a point Respondents declined to address.

IV. THIS CASE DOES NOT TURN ON FACTS SPECIFIC TO THE FLATHEAD RESERVATION BECAUSE EPA'S *"MONTANA* TEST" IS SO DILUTED AS TO ENCOMPASS ANY INDIAN RESERVATION WHERE WATERS SUBJECT TO REGULATION UNDER THE CWA EXIST.

EPA next asserts that this case is not appropriate for review because it is narrowly based on a detailed and specific set of facts. (Fed. Opp'n at 19-20.) In so arguing, EPA fails to identify for the benefit of the Court what facts could be proven that would yield a finding under its "interim operating rule" that a tribe ever lacks inherent authority. That is because under EPA's approach no such facts exist.[1]

The striking breadth of EPA's vision of what justifies application of the second exception to *Montana*'s "main rule" (*Strate*, 117 S. Ct. at 1413) is reflected in the fact that EPA does not even require *actual* threats to a tribe's health or welfare. Instead, EPA asserts that the mere *possibility* of such effects is sufficient. The agency's "*Montana*-Test Guidance" document thus asks whether "[i]f no pollution is presently being produced, [there are] circumstances showing that new pollution sources *may be established in the future* [since] [t]he threat of such impacts is a reasonable basis for a tribal government to establish controls intended to prevent harm from occurring in the first

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[1] EPA's attempt to shift the blame to Petitioners is disingenuous. (Fed. Opp'n at 12 n.1; *id.* at 19.) It first asks the Court to presume that there are facts which Petitioners could have proven that would have made a difference when, for reasons discussed in the text, there clearly are none. Secondly, in so arguing EPA also fails to mention that many of the facts upon which EPA purported to rest its decision – facts which Petitioners apparently were required to disprove – were assembled by EPA *after* Petitioners had submitted their response and were not brought to Petitioners' attention. (A.R., Vol. II, Tabs 25, 30, 31.)

place." (Br. Amici States of Arizona et al. at 29a-30a) (emphasis added); (*see also* Pet. 63a) ("the State submittal should have presented any available data demonstrating that impairment of waters by activities on fee lands would not have potential effects on the health and welfare of the Tribes").[2]

Because EPA's "operating rule" is applicable in essentially all situations where "waters of the United States" are present on an Indian reservation, its contention that it decides TAS applications "on a Tribe-by-Tribe basis" is a red herring. (Fed. Opp'n at 19.) Since the same "generalized findings" will apply to each tribe and since EPA will always be- able to determine that there are jurisdictional waters on the reservation used by tribal members – and thus that there is the potential of future harm – EPA will always reach the same conclusion. It makes no difference whether each TAS application is decided separately or whether "EPA conducts a careful inquiry into the particular water resources and land-ownership patterns on each reservation" (*id.*), if the result in all cases is identical.

Lastly, whatever might be said about EPA's approach, there is little in the Court of Appeals' analysis indicating that its holding is factually limited. Although the court mentioned EPA's factual appendix in its introductory discussion (Pet. 8a-9a), it is hardly clear that those facts limit the decision's scope. In the critical portion of its opinion, the only "facts" the Court of Appeals discussed were that the nonmember "conduct . . . involves the tribe's water

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[2] On this point, less than a month ago EPA argued to a Montana federal district court that "neither EPA's regulations nor the Ninth Circuit's decision . . . require a showing of actual on-going nonmember-caused harm to clean water as a prerequisite to TAS status. Rather, *potential harms are sufficient.*" (EPA's Resp. Mem. at 5-6), *State of Montana v. United States EPA*, No. CV-97-49-BLG-JDS (D. Mont. Aug. 11, 1998 emphasis added); (Reply Br. at 7a).

rights" (Pet. 12a) and the axiom that "[a] water system is a unitary resource" (*id.*). Under the Court of Appeals' reasoning, as under EPA's 1991 rulemaking, if the non-member activity involves or affects water on the reservation, tribal authority under the second *Montana* exception necessarily follows. (Pet. 12a.)[3]

V. EPA'S SUGGESTIONS THAT THE COURT OF APPEALS' DECISION HAS LIMITED PRECEDENTIAL VALUE AND THAT THIS COURT SHOULD AWAIT A CONFLICT MERELY TEMPORIZE.

EPA lastly argues that "this case has limited precedential value outside of [this] specific regulatory context." (Fed. Opp'n at 20.) Neither EPA nor the Tribes have contested the scope of treatment-as-State activity reflected in the appendix to the petition. (*See* Pet. 135a-146a.) Consequently, even within its "specific regulatory context," the impact of the Court of Appeals' decision is quite significant. The Tribes' related argument that, at present, any direct regulation of Petitioners' activities will be filtered through EPA (Tribes' Opp'n at 7; *see also* Fed. Opp'n at 12-13) does not diminish the immediacy of their regulatory powers, since "EPA will not issue an NPDES permit [to Petitioners] if the CSK Tribes deny certification." (Fed. Opp'n at 8.) The Tribes' argument also mischaracterizes the issue, which is not the

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[3] On this point, less than two weeks ago EPA argued to a Montana federal district court:

> [T]here is nothing in the Ninth Circuit's decision in the Flathead case to suggest that the court considered the facts of that case to constitute the minimum standard against which all future cases of this nature will be judged. Indeed, the court hardly discussed the facts of the Flathead case at all.

(EPA Reply Mem. at 3), *State of Montana v. United States EPA*, No. CV-97-49-BLG-JDS (D. Mont. Aug. 24, 1998); (Reply Br. at 14a).

directness or indirectness of tribal regulation but rather whether the Tribes are entitled to treatment-as-State status in the first place.

Moreover, the notion that the Court of Appeals' decision has limited precedential value is not credible. The court expressly viewed this case as presenting a general question of inherent authority under *Montana*. (Pet. 9a-10a.)[4] EPA's own effort to support the decision below implicitly admits that fact in its reliance on *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017, 1023 (8th Cir.), *cert. denied*, 118 S. Ct. 64 (1997). (Fed. Opp'n at 16.) It is also clear from EPA's recent arguments to the Montana federal district court (*see supra* notes 2 and 3), and from the fact it has decided to extend "generalized findings" to environmental programs involving other regulated media (Br. Amici States at 21a), that EPA intends to apply the Court of Appeals' decision broadly.

Finally, EPA's suggestion that this Court should await an explicit conflict to develop (Fed. Opp'n at 18-19) is unfair to the Petitioners and their nonmember constituents – and others in the Ninth Circuit who are similarly situated – who will be required in the interim to comply with tribal standards and potentially to make irretrievable commitments of resources as a consequence. Given the ongoing and unavoidable responsibilities that Petitioners have to provide water, sewer, and other public works, a timely answer to this question is imperative. (*See* Mot. Leave File Amicus Curiae Br., National Water Resources Ass'n, et al. "The development of policies and

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[4] Petitioners did not discuss *City of Albuquerque v. Browner*, 97 F.3d 415, 419 (10th Cir.), *cert. denied*, 118 S. Ct. 410 (1997), in the petition because that decision did not deal with the question of inherent tribal authority over nonmembers under the second *Montana* exception. *City of Albuquerque* has no bearing on this case.

projects to meet future needs requires a degree of certainty about regulatory regimes so that meaningful planning, in terms of legal and financial support for developments as well as engineering, can take place.") EPA's deferral suggestion also belittles the quite remarkable federalism concerns raised by the lower courts' blithe endorsement of tribal regulatory powers over a State and its political subdivisions. The petition presents a straightforward legal question involving primarily the proper reading of this Court's prior opinions and which will not benefit from additional consideration by the lower courts. That question has immediate and wide-ranging practical significance and should be answered definitively now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE UNITED STATES DISTRICT COURT
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STATE OF MONTANA, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants, and ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, MONTANA, Defendant-Intervener.	CV-97-49-BLG-JDS EPA'S RESPONSE MEMORANDUM TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

As the Court is aware, this case is the second attempt by the State of Montana to challenge a decision by the United States Environmental Protection Agency ["EPA"] to allow Indian tribes to set water quality standards within their respective reservations. In this case, EPA determined that the application of the Assiniboine and Sioux Tribes of the Fort Peck Reservation meets the criteria of § 518(e) of the Clean Water Act ("CWA"), 33 U.S.C.

§ 1377(e), and that the Tribes may set water quality standards within the Fort Peck Reservation pursuant to the CWA.

In Montana's first challenge to an EPA determination that a tribe may set water quality standards within its reservation, the Ninth Circuit upheld EPA's interpretation of federal case law delineating the extent of tribal authority over nonmember activities occurring on a tribe's reservation. *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998), *petition for cert. filed*, 97 U.S.L.W. 1929 (U.S. June 10, 1998) (No. 97-1929) [hereinafter "the Flathead TAS case"]. The Ninth Circuit also reviewed and upheld EPA regulations governing the requisite factual showing necessary for a tribe to be granted treatment-in-the-same-manner-as-a-state status ["TAS status"] pursuant to the CWA. *Id.* at 1141.

In Montana's present challenge to EPA's determination that the Fort Peck Tribes qualify to set water quality standards for all surface waters within the boundaries of their reservation, Montana makes two arguments. Their first argument is that because both the state and federal governments have authority to implement the CWA with respect to nonmembers within the Fort Peck Reservation, the Tribes then lack the authority to do the same. Their second argument is that EPA's decision was arbitrary because there was not a sufficient factual basis to determine that the Fort Peck Tribes qualify to implement a water quality standards program under the CWA. Montana asserts that the Administrative Record does not reflect the existence of an actual threat posed by nonmember activities.

Both of these arguments are flawed. No federal court has ever premised the existence of tribal authority over nonmembers on the lack of authority by either a state or the federal government. Additionally, EPA's determination in this case is amply supported by the Administrative Record, and consistent with the Ninth Circuit's decision in the Flathead TAS case.

ARGUMENT

A. THE EXERCISE OF TRIBAL CIVIL AUTHORITY OVER NONMEMBER ACTIVITY DOES NOT DEPEND UPON WHETHER ANOTHER SOVEREIGN MAY EXERCISE AUTHORITY OVER THE SAME ACTIVITY.

The exercise of tribal civil regulatory authority over nonmembers does not depend upon whether another sovereign has authority over the same activity, but upon whether, in this case, the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 556 (1981). This is the second, and applicable, prong of the "*Montana* test" which is the inquiry to determine when a tribe has retained the inherent sovereign powers to exercise civil jurisdiction over nonmembers on fee lands within a tribe's reservation. *Id.*

After applying this test, the Ninth Circuit held in the Flathead TAS case that a tribe can exercise "inherent Tribal regulatory authority over nonconsenting nonmembers" for the purpose of developing a water quality standards program under the CWA. *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998). The Ninth Circuit found, as

long as certain factual elements are present, that regulating the quality of water on a reservation passes the *Montana* test because:

> due to the mobile nature of pollutants in surface water it would in practice be very difficult to separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation: "A water system is a unitary resource. The actions of one user have an immediate and direct effect on other users."

Id. (citations omitted). The Ninth Circuit specifically held that EPA's decision was consistent with the Supreme Court's decision in *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997). 137 F.3d at 1141.

Montana now argues that this Court should read the *Strate* decision to bar tribal jurisdiction except where no federal or state protection exists. *Strate* does not support Montana's theory.

In *Strate*, the Court held that the tribal court in the case did not have jurisdiction over a tort claim between two nonmembers who were in a traffic accident on a state highway within the reservation. *Id.* at 1414. The Court applied the *Montana* test and held that the conduct between the two nonmembers on a highway that the tribe had not reserved a right to control did not threaten the self-governance of the tribe. *Id.* The Court did not base its decision, nor did it mention as a line of inquiry, the fact that another court had jurisdiction over the accident. *See id.* In essence, Montana is arguing for the Court to add a new prong to the *"Montana test"* that would preclude

tribal jurisdiction over nonmembers in virtually all circumstances where state or federal jurisdiction exists.

This argument was specifically rejected by the Ninth Circuit in the Flathead TAS case. 137 F.3d 1141 ("there is no suggestion [by the Supreme Court] that inherent authority exists only when no other government can act"). Nor has any other federal court decision dealing with a tribe's assertion of authority over nonmembers explored as a line of relevant inquiry whether some other sovereign could assert jurisdiction over the same conduct that the tribe sought to assert jurisdiction.

Because the absence of jurisdiction by another sovereign is not a prerequisite to the assertion of jurisdiction by a tribe over nonmembers, Montana's contrary argument should be rejected and EPA's decision should be upheld.

B. EPA'S DECISION IN THIS CASE IS AMPLY SUPPORTED BY THE ADMINISTRATIVE RECORD

As we have shown, the Administrative Record in this case fully supports EPA's decision to grant the Tribe's TAS application. *See* EPA Memorandum In Support of Motion for Summary Judgment, pp. 15-20. EPA correctly determined that nonmember activity on fee lands may cause serious and substantial impacts on the health and welfare of the Tribes. *See id.*

Montana asserts that EPA's determination cannot be upheld, arguing that the Administrative Record does not reflect an actual nonmember-caused threat to the Tribes'

interest in clean water. However, neither EPA's regulations nor the Ninth Circuit's decision in the Flathead case require a showing of actual on-going nonmember-caused harm to clean water as a prerequisite to TAS status. Rather, potential harms are sufficient. *See* 137 F.3d at 1139-40. *See also Montana v. United States,* 450 U.S. at 566 (threats to tribal health and welfare satisfy the *Montana* test).

Moreover, Montana's argument is inconsistent with the CWA's goal of eliminating water pollution. If the Court were to adopt Montana's reasoning, the Tribes could only regulate the quality of water on or adjacent to fee lands after a nonmember had begun discharging pollutants into the water from the lands. If the nonmembers activities then ceased, the Tribes would lose jurisdiction because there would no longer be an actual discharge of pollutants. Such an interpretation would be inconsistent with the CWA's express goal of eliminating all discharges to surface waters. *See* 33 U.S.C. § 1251(A)(1).

Montana cites three post-*Strate* Ninth Circuit decisions in support of this argument. Two of these decisions address whether tribal courts can assert jurisdiction in tort cases involving nonmembers. *County of Lewis v. Allen,* 141 F.3d 1385 (9th Cir. 1998); *Wilson v. Marchington,* 127 F.3d 805 (9th Cir. 1998), *cert. denied,* 118 S. Ct. 1516 (1998). The third case involves a tribal court interpreting the Montana State Constitution and then issuing an injunction against Yellowstone County prohibiting it from taxing fee land within a reservation. *Yellowstone County v. Pease,* 96 F.3d 1169 (9th Cir. 1997), *cert. denied,* 117 S. Ct. 1691 (1997).

While these decisions do find that tribes may lack jurisdiction over nonmembers in certain unrelated contexts, none of these decisions interprets a tribe's authority over nonmembers for the purposes of developing a water quality standards program under the CWA, nor for any other purpose directly related to the health and welfare of the reservation population. The Flathead TAS case did interpret tribal authority in this context, and EPA's decision in this case is consistent with the court's decision in that case.

In the Flathead TAS case, the Ninth Circuit noted that potential activities on fee lands, including agricultural activities, could impact tribal water quality. 137 F.3d at 1139-40. The court specifically reasoned that, due to the mobile nature of pollutants in the surface water, it would be difficult to separate the effects of water quality impairment from fee lands with those on member-owned lands. *Id.* at 1141. Thus, pursuant to the Ninth Circuit's opinion, EPA may base its decision on potential impacts.

In this case, EPA specifically determined that tribal water quality was impaired and found in its professional judgment that, due to the nature of land-ownership and hydrology on the Reservation, it is very likely that activities on fee lands cause or contribute to such impairment. *See* EPA's Memorandum In Support of Motion for Summary Judgment, p. 18; A.R. Tab 30 at A-5. Consistent with the *Montana* test, neither EPA's regulations nor the Ninth Circuit's decision in the Flathead TAS case require more. Therefore, EPA's decision is amply supported by the Administrative Record and it should be upheld. *See id.*, pp. 15-20.

CONCLUSION

For the reasons stated above, this Court should deny plaintiff's motion for summary judgment.

Respectfully submitted,

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FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

STATE OF MONTANA, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, MONTANA, DEFENDANT-INTERVENOR.	CV-97-49-BLG-JDS REPLY MEMORANDUM IN SUPPORT OF EPA'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

We previously demonstrated that EPA's decision to approve the Fort Peck Tribes application under section 518(e) of the Clean Water Act ("CWA"), 33 U.S.C. § 1377(e), to develop a water quality standards program for all surface waters on the Fort Peck Reservation under CWA section 303, 33 U.S.C. § 1313, should be upheld, and that Montana's arguments to the contrary have no merit. *See* Memorandum in Support of EPA's Motion for Summary Judgment; EPA's Response Memorandum to Plaintiff's Motion for Summary Judgment. We showed that the

regulations under which EPA made its decision here were expressly upheld by the Ninth Circuit in *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998), *petition for cert. filed*, 97 U.S.L.W. 1929 (U.S. June 10, 1998) (No. 97-1929) ("the Flathead case"), and that EPA's Administrative Record amply supports its decision in this case. *See id.*

In response, Montana argues that the Ninth Circuit's decision does not preclude it from challenging the factual basis for EPA's decision in this case. Plaintiff's Response Brief at 2-3. It then argues, as it did in its opening brief, that the Administrative Record in this case is insufficient because it does not contain the "critical facts" that were necessary for the Ninth Circuit's decision in the Flathead case. *Id.* However, while Montana may challenge the factual basis for EPA's decision in this case, as we have shown, and as is further shown below, its arguments fall wide of the mark. Accordingly, EPA's motion for summary judgment should be granted.

ARGUMENT

The Administrative Record Supports EPA's Decision in this Case.

Montana asserts that the Ninth Circuit's decision in the Flathead case was based upon the "critical" facts that point source discharges on fee lands were actually causing water quality impairment on tribal lands. Plaintiff's Response Brief at 3.[1] We have already shown that this

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[1] Montana's apparent contention that there must be point source discharges from fee lands before EPA may grant a tribal application under CWA section 518(e) is inconsistent with the

argument lacks merit. *See* EPA's Response Memorandum to Plaintiff's Motion for Summary Judgment at 5-7. Accordingly, our arguments here are brief.

Contrary to Montana's assertion, there is nothing in the Ninth Circuit's decision in the Flathead case to suggest that the court considered the facts of that case to constitute the minimum standard against which all future cases of this nature will be judged. Indeed, the court hardly discussed the facts of the Flathead case at all. *See Montana v. EPA*, 137 F.3d at 1139-40. Moreover, the court specifically included potential water quality impairment from potential sources in its brief discussion of the factual basis for EPA's decision. *See id.*[2] Accordingly, Montana is

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CWA. Water quality standards adopted under CWA section 303(c) are ambient standards which govern the contribution of pollutants from all sources, both point and non-point. Under CWA section 319, states and authorized tribes may adopt best management practices to control non-point sources in order to meet water quality standards. *See* 33 U.S.C. § 1329. States and authorized tribes may also establish controls on non-point sources to implement section 303(d), 33 U.S.C. § 1313(d), which generally requires that total maximum daily loads ("TMDLs") be developed where water quality standards are not being achieved. TMDLs include the identification of controls on both point source and non-point source discharges. 40 C.F.R. § 130.2(i). Thus, it was appropriate for EPA to consider impacts from non-point sources in this case. *See* Memorandum in Support of EPA's Motion for Summary Judgment at 15-20.

[2] The Ninth Circuit also focused upon potential impacts from nonmembers to a reservation's water quality when applying the *Montana* test in *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 964 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982). Thus, the consistent case law in this Circuit is that potential impacts may be considered under the *Montana* test.

wrong in its assertion that the Flathead case requires there to be actual point source discharges from fee lands which are actually impairing tribal waters before EPA can grant a tribal application for authority to develop a water quality standards program under CWA section 518(e).[3]

In fact, the primary holding in the Flathead case is that EPA's regulations, under which both its decision there and its decision here were made, "are valid as reflecting the appropriate delineation and application of inherent Tribal regulatory authority over non-consenting nonmembers." *Montana v. EPA*, 137 F.3d at 1141. EPA's regulations allow a tribe to demonstrate either potential or actual impacts, provided that the impacts be serious and substantial. *See* 56 Fed. Reg. 64,876, 64,878 (Dec. 12, 1991) (middle column). Thus, the regulations do not require that actual impacts must be occurring from fee lands before it can grant a tribal application. Therefore, it was reasonable for the Tribes to request authority to set water quality standards in order to protect themselves from potential as well as actual impacts, and it was likewise reasonable for EPA to consider all such impacts when it reviewed the Tribes' application.

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[3] Montana's argument that there must be actual impacts before a tribe may have authority to set water quality standards is also inconsistent with the Supreme Court's formulation of the *Montana* test: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct *threatens or* has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981) (emphasis added).

At bottom, the question presented here is whether it was arbitrary and capricious for EPA to grant the Fort Peck Tribes' application, giving due deference to EPA's factual determinations regarding all the relevant impacts. *See* Memorandum in Support of EPA's Motion for Summary Judgment at 10-11. We previously showed that it was not, and that EPA correctly considered the ample evidence in the Administrative Record regarding water quality impacts when it approved the Tribes' application. *See* Memorandum in Support of EPA's Motion for Summary Judgment at 15-20. Accordingly, EPA's motion for summary judgment should be granted.[4]

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[4] The Fort Peck Tribes argue that section 518(e) is a direct delegation of authority for approved tribes to regulate water quality for all sources within the exterior boundaries of the reservation. At the time EPA promulgated its water quality standards regulations, EPA declined to construe CWA section 518(e) as a direct delegation of authority to tribes over all reservation water pollution sources. 56 Fed. Reg. at 64,879-80. However, in its decision document, EPA also recognized that to the extent the Tribes' position is correct, it would provide additional support for EPA's determination in this case. AR Tab 30 at 8.

CONCLUSION

For all these reasons, as well as those stated in EPA's previous memoranda, EPA's motion for summary judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the undersigned caused a true and correct copy of the foregoing Reply Memorandum in Support of EPA's Motion for Summary Judgment to be served by first class mail upon the following counsel of record:

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